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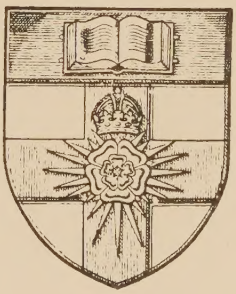

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THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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1924.—VOL. I.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1924, will be as follows:—

In the First Series,
[1924] 1 Ch. [1924] 2 Ch.

In the Second Series,
[1924] 1 K. B. [1924] 2 K. B. [1924] P.

In the Third Series,
[1924] A. C.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

LUXARDO *v.* PUBLIC TRUSTEE.

ROMER J.

1923
May 9, 10, 17.

[1921. L. 3223.]

Treaty of Peace—Construction—Austro-Hungarian Bank—Liquidation—National of former Austrian Empire—Assets in this Country—Charge—Treaty of Peace with Austria, Part IX., s. III., art. 206; *Part X., s. IV., art.* 249 (*b*), *Annex to s. IV.—Treaty of Peace* (*Austria*) *Order*, 1920.

The plaintiffs, who were the receivers of the Austro-Hungarian bank appointed by the Reparations Commission under art. 206 of the Treaty of Peace with Austria, claimed that they were by virtue of that article entitled to liquidate and administer the property, rights and interests in this country belonging to the bank at the date of the coming into force of the Treaty of Peace with Austria, and that the same were not subject to the charge referred to in art. 249 of the same treaty and to the liquidation and retention thereof by the defendant the Public Trustee, who was the custodian of enemy property in this country and the administrator appointed to administer such charge upon the property, rights and interests in this country of Austrian nationals:—

Held, that arts. 206 and 249 were quite independent of one another, and were addressed to distinct matters, the former dealing with the currency notes of the bank, which for that purpose was put into liquidation, and the latter with the property in this country of Austrian nationals; that the bank was, at the date of the coming into force of the Treaty of Peace with Austria, a national of the former Austrian Empire, and that, therefore, its property in this country was subject to

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the provisions of art. 249, under which the assets of Austrian nationals in this country when the Treaty of Peace came into force would merely be replaced by assets of equal value in Austria if the Austrian Government carried out the obligations undertaken by it under art. 249, and the plaintiffs would apply those assets in discharge of the bank's liabilities in accordance with art. 206; and that the action must be dismissed.

WITNESS ACTION.

This action raised the question whether the property in this country belonging to the Austro-Hungarian Bank at the dates of the coming into force of the Treaty of Peace with Austria, July 16, 1920, and of the Treaty of Peace with Hungary, July 26, 1921, respectively, were subject to the provisions of art. 249 (*b*) of s. IV., of Part X., of the Treaty of Peace with Austria and art. 4 of the annex to s. IV., and to the corresponding provisions of the Treaty of Peace with Hungary.

By art. 249 (*b*) it was provided that, subject to any contrary stipulations provided for in that treaty, the Allied and Associated Powers reserved the right to retain and liquidate all property, rights and interests which at the date of the coming into force of the treaty belonged to nationals of the former Austrian Empire, or companies controlled by them, and were within the territories, colonies, possessions and protectorates of such Powers; that such liquidation should be carried out in accordance with the laws of the Allied or Associated State concerned; and that the owner should not be able to dispose of such property, rights and interests, or subject them to any charge without the consent of that State. By art. 4 of the annex to s. IV. it was provided that all the property, rights and interests of nationals of the former Austrian Empire within the territories of any Allied or Associated Power, and the net proceeds of their sale, liquidation or other dealing therewith might be charged by that Allied or Associated Power with certain payments. By the Treaty of Peace (Austria) Order, 1920, it was provided (inter alia) that s. IV. and the annex thereto of the Treaty of Peace should have full force and effect as law; and that for the purpose of carrying out the same all property, rights and interests within His Majesty's Dominions or Protectorates

belonging to nationals of the former Austrian Empire at the date when the Treaty came into force, and the net proceeds of their sale, liquidation or other dealings therewith should be thereby charged with certain payments in respect of claims of British nationals.

The plaintiffs were the receivers of the Austro-Hungarian Bank appointed by the Reparations Commission under art. 206 of the Treaty of Peace with Austria, and art. 189 of the Treaty of Peace with Hungary.

The bank was a corporation created by or incorporated under the laws of the former Austro-Hungarian monarchy, and conducted the banking business thereof, managing the business connected with the national debt of the monarchy and issuing monarchy notes payable on demand. By the articles already mentioned the bank was put into liquidation as from September 11, 1919, the day succeeding the day of the signature of the Treaty of Peace with Austria.

The defendant, the Public Trustee, was Custodian of Enemy Property for England and Wales by virtue of the Trading with the Enemy Amendment Act, 1914, and amending Acts.

The defendant, the Administrator of Austrian Property, was appointed by the Treaty of Peace (Austria) Order, 1920, and amending Orders to control and manage a clearing office and to administer (inter alia) the charge imposed by those Orders upon the property, rights and interests, within His Majesty's Dominions or Protectorates, of or belonging to nationals of the former Austrian Empire.

The defendant, the Administrator of Hungarian Property, was appointed by the Treaty of Peace (Hungary) Order, 1921, and amending Orders, and had duties thereunder similar to those lastly before stated in relation to property, rights and interests of or belonging to nationals of the former kingdom of Hungary.

The plaintiffs alleged that the bank was possessed of or entitled to extensive property, rights and interests in this country which, under the Trading with the Enemy Amendment Act, 1914, and amending Acts or under the above-mentioned Peace Orders, had come into and were in the

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possession, power, custody or control of the defendants or some or one of them, and the plaintiffs contended that they themselves were entitled to liquidate and administer all such property, rights and interests, and to have the same handed over to them and an account of the defendants' dealings therewith, and they claimed a declaration to that effect and also a declaration that such property, rights and interests were not subject to retention or liquidation or charge under s. IV. of Part X. of the Treaties of Peace with Austria and Hungary or either of them and were not subject to the provisions of the said Treaties or Orders in Council or to the charges created under any of them; and the plaintiffs further claimed delivery up of all such property, rights and interests.

The defendants claimed that the property, rights and interests in question were subject to liquidation and retention by them and to the charges referred to in s. IV. of Part X. of both the Treaties.

The result of the evidence given at the trial is stated below in his Lordship's considered judgment.

Sir Ernest Pollock K.C., Sir John Simon K.C. and *E. F. Spence* for the plaintiffs. The property of the bank in this country is not the subject matter of the provisions of art. 249 (*b*) and of art. 4 of the annex, because the provisions of art. 249 (*b*) and of the corresponding article in the Treaty of Peace with Hungary, and the provisions of the Orders in Council giving effect to those articles do not in terms apply to the bank.

Further, the liquidation of the bank had been dealt with specially and in detail by art. 206, and the words "subject to any contrary stipulations" with which art. 249 (*b*) commences shut out matters already dealt with by art. 206.

Liquidation under art. 206, ss. 6 and 7, is quite inconsistent and incompatible with the liquidation referred to in art. 249 (*b*). For instance s. 9 of art. 206 gives the holders of currency notes therein mentioned a right against the assets of the bank in this country inconsistent with the rights conferred by art. 249. But even if art. 249 and the Orders

in Council do in terms apply to the bank and its property in this country, the Treaties of Peace contain a special code for the liquidation of the bank with which the article and Orders do not, and were not intended to, interfere, having regard to the general presumption of law recognized and applied in *Barker* v. *Edger*. (1)

[They also referred to *In re Rush*. (2)]

Sir Thomas Inskip S.-G. and *Gavin Simonds* (*Sir Douglas Hogg A.-G.* with them) for the defendants. The bank has its head office in Vienna and is a national of the former Austrian Empire. The evidence shows that the Austrian Government regarded the bank as being governed by Austrian law. Under art. 249 (*b*) the property in this country of an Austrian national is taken, and the Austrian Government has to pay compensation to the owner, and failure on its part to do that cannot affect the meaning of the Treaty, which contemplates that the Austrian Government should replace in Austria what is taken here. There is nothing in art. 206 which cuts down art. 249 (*b*). It deals with the currency notes only, and it is possible to interpret the Treaty reasonably by giving effect to both articles.

Sir John Simon K.C. in reply.

Cur. adv. vult.

May 17. ROMER J. By s. IV., art. 249 (*b*), of the Treaty of Peace with Austria, which was signed on September 10, 1919, and came into force on July 16, 1920, it is provided that subject to any contrary stipulations which may be provided for in that Treaty the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests which belonged at the date of the coming into force of the Treaty to nationals of the former Austrian Empire or companies controlled by them and were within the territories, colonies, protectorates and possessions of such Powers, that such liquidation should be carried out in accordance with the laws of the Allied or Associated State concerned; and that the owner should not be able to dispose of such

(1) [1898] A. C. 748. (2) [1923] 1 Ch. 56.

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property, rights and interests or subject them to any charge without the consent of that State.

By art. 4 of the annex to s. IV. it is provided that all the property, rights and interests of nationals of the former Austrian Empire within the territories of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power with certain payments.

By the Treaty of Peace (Austria) Order, 1920, made under the provisions of the Treaty of Peace (Austria and Bulgaria) Act, 1920, it is provided that the sections of the Treaty set out in the schedule to that Order, which included s. 4 and the annex thereto, should have full force and effect as law; and for the purpose of carrying out the said sections it was provided, amongst other things, by s. 1 (ix.), that all property, rights and interests within His Majesty's dominions or protectorates belonging to nationals of the former Austrian Empire at the date when the Treaty came into force, with an exception not material to be mentioned, and the net proceeds of their sale, liquidation or other dealings therewith should be thereby charged with certain payments in respect of claims of British nationals.

Corresponding provisions were made by the Treaty of Peace with Hungary, which was signed on July 4, 1920, and came into force on July 26, 1921, and by the Treaty of Peace (Hungary) Order, 1921.

The question that has to be determined in this action is whether the property in this country belonging to the Austro-Hungarian Bank at the dates of the coming into force of the two Treaties respectively are subject to the provisions to which I have referred. It is claimed on behalf of the plaintiffs, who are the present liquidators of the bank, appointed in pursuance of art. 206 of the Treaty of Peace with Austria and art. 189 of the Treaty of Peace with Hungary, that such property is not the subject matter of these provisions for two reasons. They contend, in the first place, that art. 249 of the Treaty of Peace with Austria and the corresponding article in the Treaty of Peace with

Hungary, and the provisions in the Orders in Council giving effect to those articles respectively, do not in their terms apply to the Austro-Hungarian Bank. In the second place they contend that even if those articles and Orders in their terms apply to the bank and its property here, the Treaties of Peace contain special provisions relating to the bank, and that the general provisions contained in art. 249 of the Treaty of Peace with Austria and the corresponding provision in the Treaty of Peace with Hungary were not intended to and do not interfere with those special provisions having regard to the general presumption of law that was recognized and applied in the case of *Barker* v. *Edger*. (1)

In dealing with these contentions it is desirable for the sake of brevity to refer to the Treaty of Peace with Austria and the Treaty of Peace (Austria) Order, 1920, alone, and the first question which it is necessary to determine is whether the Austro-Hungarian Bank was at the date of the coming into force of that Treaty a national of the former Austrian Empire.

The position of the Austro-Hungarian Bank is dealt with in vol. iii. of the Encyclopædia Britannica, 11th ed., p. 4, in a passage which it was agreed between the parties before me should be taken as being an accurate statement. That passage, so far as it is material for the purposes of this case, is as follows: "Common to the two states of the monarchy is the 'Austro-Hungarian Bank,' which possesses a legal exclusive right to the issue of bank notes. It was founded in 1816, and had the title of the Austrian National Bank until 1878, when it received its actual name. In virtue of the new bank statute of the year 1899 the bank is a joint stock company, with a stock of 8,780,000*l*. The bank's notes of issue must be covered to the extent of two-fifths by legal specie (gold and current silver) in reserve; the rest of the paper circulation, according to bank usage. The State, under certain conditions, takes a portion of the clear profits of the bank. The management of the bank and the supervision exercised over it by the State are established on a

(1) [1898] A. C. 748.

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footing of equality, both states having each the same influence." It was further stated by Dr. Coumont, an Austrian lawyer, who gave evidence on behalf of the plaintiffs in the action, as follows: "Formerly we had in the Austro-Hungarian Monarchy only one bank, called the National Bank. That was the state of things still in 1878. In 1878 was formed the Austro-Hungarian Bank, according to an agreement made between the two states of Austria and Hungary. The two States agreed to reserve their right to establish an independent bank. In every territory they agreed to establish a bank under the name of the Austro-Hungarian Bank, to issue bank notes with a privilege of 10 years, and that agreement between the two Governments, after being voted on by the Parliaments of Austria and of Hungary, was prolonged for 10 years." He went on to say that strictly the bank was neither an Austrian subject nor a Hungarian subject, adding these words: "It was very queer and curious. It was a curious state of affairs, but it was so. The Austro-Hungarian Bank had a constitution which was voted by the two parliaments. The Bank's statutes are the result of two correspondent laws, and the two correspondent laws established the Austro-Hungarian Bank. Therefore, neither the Austrian Legislature nor the Hungarian Legislature could make any modification of the statutes, only when the two States agreed to form a modification it was agreed to carry it through. For instance, the taxation in Austria and in Hungary on the Austro-Hungarian Bank was always a matter of agreement between the two States." Later on, however, Dr. Coumont was asked what are the decisive factors in determining the nationality of a corporation according to Austrian law and his answer was as follows: "When a corporation is called an Austrian corporation the fact is, first it has to be created under Austrian law, then to have its seat in Austria, and therefore to be in its whole person under Austrian law." Now there is no doubt that the bank was formed under Austrian law and that its seat is in Austria. In the statutes of the bank, to which I was referred, it is expressly provided

by para. 2 that the bank has its seat in Vienna. From this it would follow, according to Dr. Coumont, that it was in its whole person under Austrian law, and was accordingly of Austrian nationality. It may well be that it is also of Hungarian nationality, though no evidence as to the Hungarian law upon this subject was given before me. So far as Hungary is concerned, it would appear from what has already been stated that the bank was also created under Hungarian law, but whether this would be sufficient to constitute it a Hungarian national, seeing that it did not have its seat in Hungary, I have no means of determining. I cannot, however, doubt that the bank was at the date of the coming into force of the Treaty of Peace with Austria a national of the former Austrian Empire. Indeed, the contrary is not anywhere alleged in the statement of claim; and in a letter dated December 1, 1920, and signed by Mr. Whitman, who was, I understand, at that time one of the liquidators of the bank—a letter in which he stated every objection that occurred to him in favour of his contention that the bank was not subject to the provisions of art. 249—he said: "As I pointed out above, the Austro-Hungarian Bank is in no sense a national of the Republic of Austria, it is more correctly described in Article 249, section (*b*), 'as a national of the former Austrian Empire.'"

I think that Dr. Coumont, in saying that strictly the bank was neither an Austrian subject nor a Hungarian subject, meant no more than this, that its nationality was neither solely Austrian nor solely Hungarian. Dr. Coumont did not however profess to have knowledge of Hungarian law, and I cannot accept his evidence as in any way establishing the Hungarian nationality of the bank. If the bank be in fact of dual nationality, there are no doubt certain technical difficulties in applying to the bank both the provisions of art. 249 of the Austrian Treaty, and those of art. 232, which is the corresponding provision in the Hungarian Treaty. For myself I think that these difficulties would in practice be susceptible of an easy solution, but as it has not been established to my satisfaction that the bank

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is of Hungarian nationality, it is not necessary to pursue this matter further.

I will now deal with the second ground upon which the plaintiffs base their claim. For this purpose it will be necessary to consider in some detail the real effect and object of art. 249 of the Treaty of Peace with Austria and art. 206 of that Treaty, which is the article containing the special provisions relating to the bank upon which the plaintiffs rely as excluding the bank by presumption from the general provisions of art. 249, the corresponding section in the Hungarian Treaty being art. 189.

I will first consider the effect and object of the provisions of art. 249. Now under the Treaty of Peace with Austria, that country might, and in all probability would, become indebted to this country and its nationals in a considerable sum of money. It had by art. 248 (*b*) agreed to make itself responsible for certain debts due by its nationals resident within its territory to British nationals resident here. By art. 249 (*e*) it made itself liable to pay compensation to British nationals in respect of certain damage done to the property, rights and interests of British nationals. It had furthermore, under Part VIII. of the Treaty, dealing with the subject of reparations, accepted responsibility for causing the loss and damage to which the British Government and its nationals had been subjected as a consequence of the war. It was therefore only reasonable to expect that the Treaty should provide means for the discharge of these liabilities of Austria to this country in the way most convenient to all parties. The Treaty, as I understand it, has adopted the method usual in commerce for discharging the liability of a merchant resident in Austria to one resident in this country. Such a liability was not discharged by shipping gold to this country, except at times when the exchange between the countries was in an abnormal condition. The Austrian debtor would buy in Vienna a bill of exchange on London. In other words he would buy from a resident in Austria an asset that could be collected in England, and would transfer that asset to his English creditor in discharge of his liability. This was of

course convenient to all the three parties concerned in the transaction. This method on a larger scale has been adopted by art. 249 and the annex for the discharge of the liability of the Austrian Government to this country and its nationals. Austrian nationals had assets in this country that could be easily realized here. These assets will be retained and liquidated by the British Government—art. 249, sub-s. (*b*)—and the proceeds will be credited to Austria in part discharge of its debt—sub-s. (*h*) (I.)—Austria having adopted s. III. of the Treaty and the annex thereto. Austria agrees to compensate her nationals in respect of their property in this country so retained and liquidated—sub-s. (*j*). The effect of all this is in short that Austria purchases compulsorily from her nationals their property in this country, and hands over that property to its British creditors in part discharge of its liability to them. No confiscation of Austrian nationals' private property is intended or effected. The method provided for discharge of the liability of the Austrian Government should, if the provisions of the article be observed, be as convenient and as equitable for all parties concerned as in the simple case to which I referred above. Should Austria fail to compensate its nationals fully, that is to say, should fail to pay the full purchase price for their property in this country, they will no doubt be subjected to some hardship. This however will not be the fault of the Treaty and cannot affect its proper construction.

If I am right in the view that I take of the true effect and purpose of art. 249, it is clear that its provisions in no way interfere with the liquidation, compulsory or otherwise, of the general assets of an Austrian national that has property in this country. The only effect of the article in this respect is to substitute an asset in Austria for an asset in this country.

I will now turn to art. 206 to see whether it contains any special provisions that are in any way inconsistent with the general provisions of art. 249. Now art. 206 is in Part IX. of the Treaty entitled "Financial Clauses." In the last days of October, 1918, the Austro-Hungarian monarchy suddenly split up into a number of different independent States. It

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was therefore necessary to make provision for the apportionment of the various liabilities of the Austrian Government. Art. 203 (I.) deals with its secured debt, art. 203 (2.) with its pre-war unsecured bonded debt, art. 205 with its bonded war debt. Art. 206 deals with the currency notes of the Austro-Hungarian Bank, which bank, under para. 82 of its statutes, had the exclusive right in both States of the monarchy of issuing currency notes. All those notes were of course liabilities of the bank, though the bank held amongst its assets securities of the Austrian and Hungarian Governments that presumably had been deposited by those Governments with the bank as security for loans made to them by the bank by means of issues to the Governments of currency notes. Now the printing press for these notes was in Vienna. When therefore the Austro-Hungarian monarchy was on October 27, 1918, replaced by a number of independent States, including the Republic of Austria, this last mentioned State had exclusive control of the printing press. It was in this way enabled to embark upon that system of inflation of the currency that has had such a disastrous effect upon the Austrian exchange. The currency notes of the bank however still remained the unit of currency in the other independent States of the former monarchy, so that the currency of those States was being depreciated without any compensating advantage to their Governments, and the pre-existing currency notes regarded as a claim against the assets of the bank were, to use a colloquial phrase, being "watered." It was to this state of things that art. 206, as I understand it, was directed. Under this article, the Governments of the various independent States, including Austria and Hungary, were required, in so far as they had not already done so, gradually to retire the currency notes and replace them by new currencies. The notes so retired were to be handed over to the Reparations Commission in exchange for certificates issued to the respective Governments, and those certificates would entitle those Governments to rank as creditors against the bank to the same extent as the currency notes would have done. In order to discharge these certificates and any still

outstanding currency notes, it was essential to put the bank into liquidation, and this was duly provided for by ss. 6 and 7 of art. 206. By the first of these two sections it is provided that the bank shall be liquidated as from the day succeeding the day of the signature of the Treaty, that is as from September 11, 1919. The actual liquidation, however—that is to say, the collection, realization and distribution of the assets of the bank—could not begin until the Treaty came into force on July 16, 1920, and on that day of course art. 249 itself became effective. When the actual liquidation did take effect the bank would no doubt be regarded as having been in a state of liquidation as from the earlier date. But this circumstance does not appear to me to have any bearing upon the question that I have to decide.

Now, having regard to the facts I have previously mentioned, it was necessary to adjust the rights between the holders of currency notes issued before the break up of the monarchy and those issued afterwards. It was also necessary to adjust the rights of the various holders of notes as against the securities deposited with the bank by the Austrian and Hungarian Governments. The first of these matters was dealt with by s. 8, which provides as follows: "The currency notes issued by the Bank subsequent to October 27th, 1918, shall have a claim on the securities issued by the Austrian and Hungarian Governments, both former and existing, and deposited with the Bank by those Governments as security for these notes, but they shall not have a claim on any other assets of the Bank."

The second matter was dealt with by s. 9 and the following sections. Sect. 9 is in these terms: "The currency notes issued by the bank on or prior to October 27th, 1918, in so far as they are entitled to rank at all in conformity with this Article, shall all rank equally as claims against all the assets of the Bank, other than the Austrian and Hungarian Government securities deposited as security for the various note issues."

This section is greatly relied upon by the plaintiffs. As I understand their argument they contend that this section

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gives to the holders of the currency notes therein referred to a right against the assets of the bank in this country that is inconsistent with and must therefore prevail over the rights conferred upon the British Government and its nationals by art. 249. But the section, as I understand it, is not one that is conferring any new rights upon the holders of currency notes. It is merely one that deprives the holders of currency notes issued prior to October, 1918, of their right to rank pari passu against the Austrian and Hungarian Government securities, leaving them the right they already possessed of ranking equally as claims against all other assets of the bank whatever those assets may be. The later sections show how the Government securities are to be dealt with, but I need not refer to them further. Now what is there in these provisions inconsistent with art. 249 ? If I am right in thinking that that article does not in any way interfere with the general liquidation of any Austrian nationals' assets, why should it interfere with the general liquidation of the Austro-Hungarian Bank ? The liquidators will duly apply the assets of the bank in discharge of its liabilities in accordance with art. 206, but having regard to art. 249, the assets that were in this country when the Treaty came into force will merely be replaced by assets in Austria, assets that will be of equal value, if the Austrian Government carries out the obligations undertaken by it under sub-s. (*j*) of art. 249. It seems to me that arts. 206 and 249 are quite independent of one another and are addressed to perfectly distinct matters. There is not, in my judgment, the slightest difficulty in applying both of the sections in full to the assets and to the affairs of the Austro-Hungarian Bank. The action must accordingly be dismissed.

Solicitors for the plaintiffs : *Bull & Bull.*

Solicitors for the defendant, the Public Trustee : *Coward & Hawksley, Sons & Chance.*

Solicitor for the defendant Administrators : *Albert Saville.*

R. M.

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[1922. N. 644.]

Peace Treaty—Construction—"Property, rights and interests" of German Nationals within His Majesty's Dominions—Charge—Policies of Life Assurance issued by American Company—Simple Contract Debts—Locality—Corporation—Residence—Domicil—Treaty of Peace with Germany, s. IV.; Annex; s. V., art. 299; *Annex, para.* 4—*Treaty of Peace Order,* 1919, *s. I.* (*xvi.*)

The plaintiff company was incorporated by special Act of the Legislature of New York, and had its central office and the bulk of its assets in New York. The company had a branch in London and in most of the capitals of Europe, the branch in Paris being its head office for Europe. The general manager of the London branch had no general authority to issue policies in this country. The policies in question in this action, signed by the president and secretary of the company and countersigned by the general manager for Europe, were issued in London to German nationals before the outbreak of the war. The policies were not under seal. The policy moneys were expressed to be payable in London, but according to the general regulations, printed on the policy, all premiums were payable either at the central office in New York or at the office where the insurance was payable, and proofs of deaths were to be furnished to the New York office. An indorsement on the policy provided that it should be construed according to English law.

This action raised the question whether the policy moneys payable under the policies in question, which had matured on or before January 10, 1920, the date when the Treaty of Peace with Germany came into force, were "property, rights or interests within His Majesty's dominions" belonging to German nationals and subject to the charge created by s. I. (xvi.) of the Treaty of Peace Order, 1919:—

Held, that there was nothing in art. 299 of s. V. of the Treaty of Peace with Germany, or in para. 11 of the annex thereto, that indicated that the property, rights or interests of the assured under such contracts were to be excluded from the general charge under para. 4 of the annex to s. IV., but,

Held, further, that the policy moneys in question, being simple contract debts, were situate in the country in which the plaintiff company was residing, notwithstanding that they were expressed to be payable in London; that the residence and domicil of the company were determined by the locality of its principal place of business, which, in all the circumstances, was New York; and that, therefore, the simple contract debts of the plaintiff company due under the policies to German nationals on January 10, 1920, were not at that date within His Majesty's dominions, and accordingly were not subject to the charge referred to

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in s. IV. of the Treaty of Peace and created by s. I. (xvi.) of the Treaty of Peace Order, 1919.

Attorney-General v. *Bouwens* (1838) 4 M. & W. 171; *Commissioner of Stamps* v. *Hope* [1891] A. C. 476; *Toronto General Trusts Corporation* v. *The King* [1919] A. C. 679; and *Hilliard* v. *Cox* (1700) 1 Ld. Raym. 562 applied.

WITNESS ACTION.

This action raised the question whether certain sums due and payable on January 10, 1920 (the date when the Treaty of Peace with Germany came into force), by the plaintiffs to various German nationals under policies of assurance issued by the plaintiffs in this country before the outbreak of war were "property, rights and interests within His Majesty's Dominions" belonging to German nationals on January 10, 1920, and accordingly subject to the charge created by s. 1 (xvi.) of the Treaty of Peace Order, 1919.

The constitution of the plaintiff company, its methods of carrying on business and the forms of the policies issued, together with the result of the evidence at the trial of this action, are stated below in his Lordship's considered judgment, which statement supplements for the purposes of this action the statement of facts relative to the company's constitution and business contained in the report of *New York Life Insurance Co.* v. *Styles*. (1)

The only defendant to the action was the Public Trustee as the custodian of enemy property.

Schiller K.C. and *H. G. Robertson* for the plaintiffs. Property, rights and interests consisting of or arising under contracts of life insurance such as these are not included in the charge at all. The charge created by the Treaty of Peace Order was for the purpose of giving effect to s. IV. of the Treaty of Peace. Contracts of insurance entered into between an insurer and a person who afterwards became an enemy are (inter alia) expressly dealt with in s. V. of the Treaty. Art. 299 of s. V. and the annex show, we submit, that property, rights and interests arising under life insurance contracts are excluded from the charge, otherwise there would

(1) (1889) 14 App. Cas. 381.

be an inconsistency between ss. IV. and V. Art. 299 has no relation to a contract made in this country by an American national with a German national, and it bases enemy character upon nationality irrespective of residence.

Further, the plaintiffs are an American company with the head office in New York. This is a simple contract, not a specialty, debt. The German assured has a mere chose in action, and he could sue the plaintiffs with success in Germany, and, if the defendant is right, the plaintiffs would in that case have to pay twice over, because their assets over here would be seized by the defendant. The plaintiffs cannot pay through the clearing office, because they are not British nationals. On a simple contract debt the locality follows the debtor. The locality of a chose in action is in that country where the debtor lives, and the plaintiff company has its residence in New York, where it "keeps house and does business": *Attorney-General* v. *Bouwens* (1); *Commissioner of Stamps* v. *Hope* (2); *De Beers Consolidated Mines* v. *Howe* (3); *Toronto General Trusts Corporation* v. *The King* (4); *Bradbury* v. *English Sewing Cotton Co.* (5): Williams' Saunders (ed. 1871), vol. i., p. 38, n. (*c*), p. 96, n. (2.); Dicey's Conflict of Laws, 3rd ed., p. 342. A corporation, unlike an individual, can have only one residence, and the plaintiffs' residence is New York. For this reason also the moneys due and payable under these policies were not, on January 10, 1920, property, rights or interests within His Majesty's Dominions belonging to German nationals affected by the charge.

Sir Douglas Hogg A.-G. and *Gavin Simonds* for the defendant. The question for the Court is whether or not at the time when the Peace Treaty came into force there were in England any property, rights or interests belonging to German nationals.

A debt is not always situate where the debtor is; it may also be situate where the creditor's claim can be properly

(1) 4 M. & W. 171.
(2) [1891] A. C. 476.
(3) [1906] A. C. 455.
(4) [1919] A. C. 679.
(5) [1922] 2 K. B. 569; [1923] W. N. 206; [1923] A. C. 744.

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enforced: Dicey's Conflict of Laws, 3rd ed., p. 342. These policies expressly provide that the moneys shall be payable in London. A company can be both resident and domiciled in more than one country; "it may have more than one residence, and more than one domicil": Buckley on the Companies Acts, 9th ed., p. 153; *Carron Iron Co.* v. *Maclaren* (1); *La Bourgogne* (2); *Haggin* v. *Comptoir d'Escompte de Paris.* (3) The debtor can be sued in this country on the debt: Dicey's Conflict of Laws, 3rd ed., p. 344. This chose in action was therefore situate in this country and constituted property, rights or interests in this country of the assured German nationals at the material date, and is subject to the charge. The fact that the plaintiffs can be sued in Germany is not relevant, and cannot affect the charge in question.

There is nothing in arts. 299 and 300 or in the annex to s. V. inconsistent with this argument. Those provisions admittedly do not apply to contracts between American and German nationals. Art. 299 saves contracts of life insurance from dissolution, but there is nothing in that article or in the annex to s. 5 which exempts them from the provisions of art. 297 (*b*) or the charge under para. 4 of the annex, which, read in connection with the Treaty of Peace Order, effect a statutory transfer to the Public Trustee of the rights of a German national.

Schiller K.C. in reply.

Cur. adv. vult.

July 27. ROMER J. By s. 1 of the Treaty of Peace Order, 1919, made under the authority of The Treaty of Peace Act, 1919, all property, rights and interests within His Majesty's dominions belonging to German nationals on January 10, 1920, and the net proceeds of their sale, liquidation or other dealings therewith are charged with certain payments. At the date mentioned there were certain sums due and payable by the plaintiffs, the New York Life Insurance Company, to

(1) (1855) 5 H. L. C. 416, 449, 458. (2) [1899] P. 1, 16.
(3) (1889) 23 Q. B. D. 519.

various German nationals, which sums had accrued due under and by virtue of policies of assurance issued by the plaintiffs in this country before the outbreak of war. The plaintiffs contend that the debts in question are not subject to the charge to which I have referred. The only defendant to the action is the Public Trustee as the custodian of enemy property. None of the plaintiffs' German creditors are parties. The plaintiffs and the defendant however desire me to decide the question as between themselves, although my decision will not be binding upon those creditors.

The plaintiffs, who are nationals of the United States of America, put their case in two ways. They say in the first place that property, rights and interests consisting of, or arising under, contracts of life insurance such as I have to deal with in the present case are not included in the charge at all. Their argument on this point as I understand it is as follows. The charge created by the Treaty of Peace Order was made for the purpose of giving effect to s. IV. of the Treaty of Peace. Contracts for life insurance entered into between an insurer and a person who subsequently became an enemy are, together with certain other contracts therein specified, expressly dealt with in s. V. of the Treaty. The provisions of art. 299 of this section and of the annex thereto necessarily lead to the conclusion, so the plaintiffs argue, that property, rights and interests arising under contracts of life insurance are excluded from the charge. Any other conclusion would, they say, lead to an inconsistency between the two sections. In point of fact, arts. 299 and 300 of s. V. and the annex to the section do not apply at all to contracts made between nationals of the United States of America and German nationals. But this circumstance, the plaintiffs contend, does not affect the principle of their argument. The whole argument, however, appears to me to be without foundation. Art. 299 provides that any contract concluded between enemies shall be regarded as having been dissolved as from the time when any two of the parties became enemies, except as therein mentioned, and subject to the exceptions and special rules with regard to

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particular contracts or classes of contracts contained therein or in the annex thereto. The annex contains provisions as to various classes of contracts, including in para. 11 thereof contracts of life insurance. That paragraph provides that contracts of life insurance entered into between an insurer and a person who subsequently became an enemy shall not be deemed to have been dissolved by the outbreak of war or by the fact of the person becoming an enemy. The paragraph then goes on to provide what are to be the rights of the assured and his representatives and other persons entitled to the benefit of such contracts. I need not read these provisions or the other paragraphs of the annex in full. I can only say that, having read and considered them, I fail to find anything in them that seems in the least to indicate that the property, rights and interest of the assured consisting of or arising under such contracts were not intended to be included in the general charge provided for by para. 4 of the annex to s. IV. There is not, in my opinion, anything in s. V. that is inconsistent with giving to para. 4 of the annex to s. IV. the wide effect that its words are sufficient to produce. I cannot appreciate the argument that, because s. V. preserves and defines the rights of German nationals under contracts of life insurance, that fact is inconsistent with the subjection of those rights to the general charge stipulated for in s. IV. on all property, rights and interests within His Majesty's Dominions of German nationals.

I must now consider the second and alternative way in which the plaintiffs put their case, and for this purpose it is necessary to examine in a little more detail the constitution of the plaintiff company and the manner in which its business of issuing policies in this country was carried on. In the case of *New York Life Insurance Co.* v. *Styles* (1) the question of the liability to assessment for income tax of the plaintiff company's premium came up for determination, and I was referred to the statement of facts in that report as containing an accurate description of the plaintiffs' constitution and method of carrying on business. The statement was also

(1) 14 App. Cas. 381.

supplemented by the evidence given by Mr. William Robert Collinson, the temporarily acting manager of the plaintiffs' London office. The facts ascertained in this way are as follows: The company was incorporated by special Act of the Legislature of New York dated April 18, 1843. The central office is in New York, and the company there carries on the business of insurance on lives and all and every insurance appertaining to life. All the corporate powers of the company are exercised by a board of trustees and such officer and agents as they may appoint, and that board of trustees is in New York, where the bulk of the company's assets are also situated. A branch or department of the company for Great Britain and Ireland under the management of a general manager appointed by the trustees and responsible to them has for a long time been established and carries on business in London. The company has also branches or departments in most of the capitals of Europe including Paris, the branch in Paris being the plaintiffs' head office for Europe. The company has no shareholders and there are no shares. The company is organized for and, with an immaterial exception, does business solely under the plan of mutual insurance. The general manager of the London branch has no general authority to issue policies in this country. All applications for insurance, together with the medical report, used to be sent by him to the head office for Europe in Paris, and it was in Paris that the risk was accepted or rejected, as the case might be. If accepted, the policy was prepared in Paris and sent over here, where it was signed by the general manager, stamped, and delivered to the insured. At the present time, however, the central office in New York is substituted for the head office for Europe in Paris for these purposes. A copy of one of the policies issued in London was supplied to me. From this copy it appears that the contract purports to be made by the plaintiff company in its corporate name, and it does not purport to be made merely by the London branch. It is signed on behalf of the plaintiffs by the president and secretary of the company and countersigned by the general manager for Europe. According to

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Mr. Collinson's evidence it was also signed by the London general manager, though there is no mention of this fact in the copy supplied to me. It is an important feature of the policy that it is not under seal. According to this copy policy the policy moneys are payable in London, and Mr. Collinson stated that this is the case in every policy issued by the London office. As will appear presently, this circumstance is much relied upon by the defendant. It is however to be observed that, according to the general regulations printed on the policy, all premiums are payable either at the home office of the company, which, as I understand it, means the central office in New York, or its office where the insurance is payable, and that proofs of death must be furnished to the company at the home office. These general regulations also provide that any assignment of the policy must be made in duplicate and both sent to the home office, one duplicate to be retained by the company and the other to be returned. On the back of the policy there is indorsed a copy of the application and the agreement for the policy signed by the insurer. It is there provided that the policy applied for shall be construed according to English law.

In this state of the facts it is contended by the plaintiffs that the moneys due and payable under the policies on January 10, 1920, were not at that date " within His Majesty's dominions " and accordingly are not affected by the charge.

Strictly speaking choses in action can have no locality, but for some purposes of our law it has been necessary to assign to them a quasi locality, and from time to time rules have been laid down respecting this quasi locality of the various species of this class of personal property.

In *Attorney-General* v. *Bouwens* (1) the question arose whether probate duty was payable in respect of certain foreign Government bonds of which a testatrix was possessed at the date of her death. Her will had been proved in the Prerogative Court of Canterbury. Lord Abinger C.B. in giving judgment, after pointing out that in order to determine this question it must be ascertained whether or not the bonds

(1) 4 M. & W. 171, 191.

were to be considered as assets locally situate within the province of Canterbury, proceeds as follows: "Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can be exercised in respect of those effects only, which he would have had himself to administer in case of intestacy, and which must therefore have been so situated as that he could have disposed of them in pios usus. As to the locality of many descriptions of effects, household and moveable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death: and it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found. In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be."

In *Commissioner of Stamps* v. *Hope* (1) Lord Field, in delivering the judgment of the Judicial Committee of the Privy Council, says: "Now a debt per se, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the Courts of this country, and is a well settled rule governing all questions as to which Court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has

(1) [1891] A. C. 476, 481.

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been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be bona notabilia within the area of the local jurisdiction within which he resided; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was bona notabilia where it was 'conspicuous,' i.e., within the jurisdiction within which the specialty was found at the time of death."

Both the cases just referred to were cases in which the locality of a chose in action had to be ascertained for the purpose of determining whether it was or was not subject to the jurisdiction of the Court in granting probate. But in the case of *Toronto General Trusts Corporation* v. *The King* (1) the locality of a mortgage debt had to be ascertained for the purpose of determining whether it was liable to succession duty under the Succession Duties Act, 1914, of the Province of Alberta. By s. 7 of that Act it is enacted that: "Save as otherwise provided, all property of any person situate within the province and passing on his death shall be subject to succession duties." Lord Cave, in delivering the judgment of their Lordships, expressed himself as follows: "A claim to succession duty having been made, the administrator contended that the mortgages in question were, at the date of the testator's death, situate, not in Alberta, but in Ontario, and supported his contention by reference to the rule of law which provides that, whereas a simple contract debt is to be deemed to be within the area of the local jurisdiction within which the debtor for the time being resides, the locality of a

(1) [1919] A. C. 679, 683.

specialty debt is the place where the specialty is found at the time of the creditor's death: Wentworth on the Office of Executor, ed. 1720, p. 46; Bacon's Abridgement, tit. Executors and Administrators (E), p. 462; *Gurney* v. *Rawlins* (1); *Commissioner of Stamps* v. *Hope*. (2) This rule has been recognised in numerous decisions both here and in the Dominion of Canada, and the general principle must be regarded as well settled."

In the case of *In re Maudslay, Sons & Field* (3) a receiver of the assets of an English company having been appointed in a debenture holder's action a question arose as to the effect of that appointment in relation to a debt due to the company by a firm resident in France. Cozens-Hardy J. in the course of his judgment said: "It was urged before me . . . . that a chose in action has no locality: *Lee* v. *Abdy*. (4) But for many purposes a debt is deemed to have a locality: see *Commissioner of Stamps* v. *Hope* (2), or, as it is sometimes stated, a quasi locality. It seems to me that I must treat the debt due from Delaunay & Cie. as being situate in France." In my opinion the rules enunciated by Lord Abinger C.B. in *Attorney-General* v. *Bouwens* (5) must be applied in all cases where it is necessary to determine the locality of a chose in action for the purposes of English law. This being so, it would seem to follow that the moneys owing by the plaintiff company to the German nationals on January 10, 1920, being due upon simple contract debts were situate in the country in which the plaintiff company was then residing. It was however contended before me on behalf of the defendant that the debts in question must be deemed to have been situated in this country, inasmuch as they were expressed to be payable in London. But I cannot find that for the purpose of determining the locality of a simple contract debt the place where it is payable has ever been regarded as the determining factor. If it had been, I should have expected to find that a simple contract debt

(1) (1836) 2 M. & W. 87.
(2) [1891] A. C. 476.
(3) [1900] 1 Ch. 602, 609.
(4) (1886) 17 Q. B. D. 309.
(5) 4 M. & W. 171.

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was, as a general rule, deemed to be situated where the creditor happened to be, seeing that in general it is the duty of a debtor to find out his creditor and pay him. The truth is that in adopting the rule that a simple contract debt is situate where the debtor for the time being happens to be the Court was directing its attention not to the question of where the debt would be paid if the debtor complied voluntarily with his obligations, but to the question of the place in which he could be compelled to comply with those obligations by process of law. And this place was in the days when the rule was adopted the place where the debtor was to be found. In Dicey's Conflict of Laws, 3rd ed., p. 342, there is the following statement: "Debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced." It seems to me that I am bound by the authorities to hold that a simple contract debt is situated in the country where the debtor is for the time being residing, even though the debt be expressly payable in another country.

Where then was the plaintiff company residing on January 10, 1920?

In Dicey's Conflict of Laws, 3rd ed., p. 163, the rule as to the domicil of a corporation is thus stated: "The domicil of a corporation is the place considered by law to be the centre of its affairs, which (1.) in the case of a trading corporation, is its principal place of business, i.e., the place where the administrative business of the corporation is carried on."

It is further stated in a comment on the rule that as regards the domicil of a corporation the distinction between residence and domicil does not in general exist. Judged by this test the plaintiff company resides in New York. My attention was however called to numerous authorities in which it is laid down that a corporation may have more than one residence. When those cases are examined it will be found

that the question to be considered was whether a foreign corporation was sufficiently resident in this country as to justify service upon it of a writ in the manner prescribed by Order IX., r. 8. As pointed out by Professor Dicey on p. 164 a corporation may very well be considered resident in a country for one purpose and not for another. What I have to discover is the place in which the plaintiff company was residing for the purpose of the application of the law as to the locality of its simple contract debts. If the plaintiff corporation was residing on January 10, 1920, both in New York and in London then an application of the law as to the locality of its debts would result in the conclusion that the debts were situated in two places at one and the same time. As pointed out by Lord Cave in *Toronto General Trusts Corporation* v. *The King* (1) it is plainly impossible to hold this. The solution of the difficulty is, I think, to be found by considering the way in which the law as to the locality of a simple contract debt was applied in the case of an individual possessing more than one residence. In the case of *Hilliard* v. *Cox* (2) Holt C.J. states the law applicable to such a case as follows : " If the debtor has two houses in several dioceses, and at the time of the death of the debtee and commission of administration is inhabitant and resident at one of the houses, that will exclude the jurisdiction of the ordinary of the diocese in which the other house stood." In the application of the rule to an individual who has more than one residence the question is not therefore where does he have a residence, or even where does he have his principal residence but, at which residence, to use the words of Lord Abinger already cited, does he " happen to be " ? A corporation cannot of course in strictness be anywhere. But what place on January 10, 1920, was most analogous to the place physically occupied by an individual ? It seems to me in all the circumstances that the answer to this question must be New York.

I therefore come to the conclusion that the simple contract debts of the plaintiff company due on January 10, 1920,

(1) [1919] A. C. 679, 684.

(2) 1 Ld. Raym. 562.

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to the German nationals were not at that date within His Majesty's Dominions and accordingly are not subject to the charge created by the Treaty of Peace Order.

Solicitors for plaintiffs: *Ashurst, Morris, Crisp & Co.*

Solicitors for defendant: *Coward & Hawksley, Sons & Chance.*

R. M.

SARGANT J. 1923 *July* 11, 12, 13, 26.

REYNOLDS *v.* SHIPPING FEDERATION, LIMITED.

[1923. R. 486.]

Conspiracy—Combination by Employers' Association and Trade Union——Agreement to employ only Members of the Union—Action by Seaman of rival Union refused Employment.

A federation comprising nearly all the shipowners of this country entered into an agreement with N. Trade Union that the members of the federation should employ on their ships as seamen and firemen persons belonging to that union. In pursuance of this agreement the N. Union issued a special card to each of its members, and the shipowners instructed their ships' officers to employ no one who did not possess this card. The object of the agreement was to secure a supply of men who submitted to the decisions of the National Maritime Board, a body formed to establish "a single source of supply of sailors and firemen controlled by employers and employed." The agreement was entered into by reason of the formation of a rival trade union called the A. Union, which refused to join the National Maritime Board or be bound by its decisions as to rates of pay, terms of employment, etc.

The plaintiff belonged to the A. Union and failed to obtain employment on a ship as greaser because he had not the necessary card and refused to join the N. Union so as to procure one:—

Held, that as the agreement was entered into not from a malicious desire to inflict loss on an individual or class of individuals, but from a desire to advance the business interests of employers and employed alike by maintaining the advantages of collective bargaining and control, it was not unlawful, and no action for conspiracy was maintainable by the plaintiff.

Temperton v. *Russell* [1893] 1 Q. B. 715 and *Quinn* v. *Leathem* [1901] A. C. 495 distinguished.

The principle of *Mogul Steamship Co.* v. *McGregor, Gow & Co.* [1892] A. C. 25 applied.

WITNESS ACTION.

The plaintiff was at all material times a member of the Amalgamated Marine Workers' Union (hereafter referred to

as the Amalgamated Union), which was a union for seafaring men registered under the Trade Union Acts, 1871 to 1917. The plaintiff's occupation was that of a greaser in the ship's engine-room, and he had previously been a member of the National Sailors' and Firemen's Union (hereafter referred to as the National Union), but had ceased to contribute to it and joined the Amalgamated Union.

The defendants were the Shipping Federation, Ld. (hereafter called the Shipping Federation), which was an association of practically all the shipowners of this country except those belonging to the Port of Liverpool, the National Union and their president Havelock Wilson, and one Clark, who was representative of the National Union acting as a Port Consultant in the Port of London.

On February 20, 1923, the plaintiff applied to one Jamieson, the second engineer of the steamship *Demosthenes*, then lying in the Port of London, for employment as a greaser on the then impending voyage of the vessel to Australia. Jamieson, who had had previous experience of the plaintiff and knew him as a reliable man, told him to come to the vessel next day for the purpose of passing the doctor and signing on. The plaintiff attended accordingly and went with other men into the third-class saloon, where there were present Jamieson, the defendant Clark, Captain Bissett, a representative of the Shipping Federation, and another representative of the National Union. When the plaintiff's name was called he came forward and Jamieson was prepared to accept him, subject to an examination by the ship's doctor; but before anything definite was done Clark raised the objection that the plaintiff had not a P.C. 5 card.

This was a card issued under an arrangement for joint supply of crews made between the Shipping Federation and the National Union in circumstances which are fully set out in the judgment but may be briefly stated as follows. During the war a body called the National Maritime Board was constituted, and after the war reconstituted with the object (inter alia) of establishing "a single source of supply of sailors

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and firemen jointly controlled by employers and employed." On the Board the shipowners were represented by the Shipping Federation, the sailors and firemen by the National Union, and the men of the catering department by the National Union of Ships' Stewards, Cooks, Butchers and Bakers (hereinafter called the Stewards' Union). The masters, officers, and engineers were also represented on the Board. In 1921 the Stewards' Union withdrew from the Board, and at the beginning of 1922 amalgamated with a small sailors' and firemen's union at Southampton as the Amalgamated Union. This union did not belong to the National Maritime Board and refused to accept its decisions, and in these circumstances the Shipping Federation and National Union entered into an arrangement for the issue of P.C. 5 cards to members of the latter union, and the shipowners belonging to the Shipping Federation instructed their officers not to employ sailors or firemen who did not possess this card.

In reply to Clark's objection the plaintiff admitted that he had not a P.C. 5 card, and said that he was a member of the Amalgamated Union and not of the National Union, and, though offered an opportunity of joining the National Union, or rejoining on paying his arrears, and of thereby obtaining the necessary card, he refused to do so. Jamieson therefore took no further steps to engage him.

The plaintiff brought this action alleging that the acts and conduct of the defendants constituted a wrongful conspiracy to prevent him from obtaining employment in any ship under the control of the Shipping Federation. He further alleged by his statement of claim that the defendants unlawfully watched and beset him at the place where he happened to be—namely, the steamship *Demosthenes*—in order to prevent him from obtaining employment there in breach of the Conspiracy, and Protection of Property Act, 1875, and thereby prevented him from obtaining employment. And the plaintiff therefore claimed (inter alia) (1.) a declaration that he was entitled to employment as a merchant seaman in any vacancy on any ship, or with any shipmaster or owner, without being a member of the National Union and/or being in possession

of a P.C. 5 card; and (2.) a declaration that the agreement between the Shipping Federation and the National Union relative to the employment of merchant seamen and the issue of the P.C. 5 card in relation thereto was void as being against public policy. And he claimed an injunction to prevent the defendants from interfering with his obtaining employment as a merchant seaman and damages.

Another ground of complaint in the action had been that the Shipping Federation had in 1922 issued to the plaintiff a parchment registration certificate entitling him to employment at the recognized wages of the port in any vacancies in any ship or with any shipmaster affiliated with the Shipping Federation; but by agreement any question whether the Shipping Federation was liable for breach of this certificate was left over to be decided in another action.

A. Grant K.C. and *D. White* for the plaintiff. The Shipping Federation and the National Union have joined in a wrongful conspiracy to exclude the plaintiff and others like him from pursuing his occupation in life. No doubt it has been decided that the men of a trade union can say to their employer that they will leave his employ if he continues to employ a non-union man: *Allen* v. *Flood.* (1) But it has never been decided that an association of employers and a trade union can combine to agree that the employers belonging to the association will not employ men who do not belong to the union. At common law a combination to prevent free employment was illegal: *Reg.* v. *Druitt* (2), and the law was altered in favour of trades unions by the Trade Union Act, 1871, ss. 2, 3 and 4, so as to render them lawful notwithstanding that they were in restraint of trade.

But in *Temperton* v. *Russell* (3) it was held that an action was maintainable against the members of a joint committee of three trade unions for conspiring maliciously together to injure a man by preventing other persons from entering into contracts with him. That principle is applicable here.

(1) [1898] A. C. 1. (2) (1867) 10 Cox, C. C. 592, 600.
(3) [1893] 1 Q. B. 715, 732.

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Moreover it is pointed out by A. L. Smith L.J. there that if the conspiracy was entered upon to compel the person affected to do what he did not wish to do, that would be conspiring "maliciously" in point of law: see also *Quinn* v. *Leathem* (1), which shows that the decision in *Temperton* v. *Russell* (2) is good law, although some dicta in Lord Esher's judgment cannot be supported.

[SARGANT J. In both those cases the conspiracy was directed against an individual, but that is not so here. The whole object of the arrangement entered into was to avoid friction and preserve collective bargaining.]

The law must be the same even if the conspiracy is directed against a class of individuals—namely, those not belonging to the National Union.

[SARGANT J. The Shipping Federation seems to have entered into the arrangement simply for the advantage of the businesses of its members, and not with the intention of injuring an individual or class of individuals.]

In fact the result is to injure a class of individuals, and the principle of *Temperton* v. *Russell* (2) applies.

Further, the defendants have watched and beset the plaintiff at the place where he happened to be—namely, the steamship *Demosthenes*—with a view to compelling him to join the National Union in breach of the Conspiracy, and Protection of Property Act, 1875, s. 7.

Greene K.C. and *H. C. Bischoff* for the Shipping Federation. There is nothing to prevent a body of employers agreeing together not to employ an individual or a class of individuals, and the motive is immaterial. There is no legal right of the individual or class of individuals thereby infringed. And there can be no malice in a legal sense unless a legal right is infringed: *Allen* v. *Flood* (3); *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (4)

[SARGANT J. Has not a man at least as good an expectation of obtaining employment in his calling as of obtaining

(1) [1901] A. C. 495, 509.
(2) [1893] 1 Q. B. 715, 732.
(3) [1898] A. C. 1, 93.
(4) (1889) 23 Q. B. D. 598, 612; [1892] A. C. 25.

contracts from persons with whom he has had previous contracts? If so, why does not the principle of *Quinn* v. *Leathem* (1) apply?]

A man's reasonable expectation of obtaining employment has nothing to do with his legal rights.

Here however the case can be put on a narrower ground. There is no question of a combination directed to compelling the plaintiff or any one else to join a particular union. The sole object of the arrangement entered into is to secure a supply of labour which will be bound by decision of the National Maritime Board, and so to prevent endless trouble and friction. In both *Temperton* v. *Russell* (2) and *Quinn* v. *Leathem* (1) there was an attempt by intimidation or otherwise to prevent a man who wished to do so from competing. And they may be contrasted with *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3), where the object of the defendants was not to ruin the trade of a competitor but to keep the trade in their own hand. The principle of that case applies here.

Rolt K.C. and *R. F. Roxburgh* for the remaining defendants. The claim against the defendants is based on malicious conspiracy, but there is no evidence whatever of malice. On the other hand, the juries in both *Temperton* v. *Russell* (4) and *Quinn* v. *Leathem* (5) found malice.

A. Grant K.C. in reply. *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) determines that capitalists can combine for purposes of trade, although the result may be to cause loss to a rival trader. But a combination directed against an individual is illegal. And the law to that effect ought to be extended to apply to a combination against a class of individuals.

Cur. adv. vult.

July 26. SARGANT J. delivered the following written judgment: The main object of this action is to obtain a

(1) [1901] A. C. 495.
(2) [1893] 1 Q. B. 715.
(3) 23 Q. B. D. 598, 617; [1892] A. C. 25.
(4) [1893] 1 Q. B. 715, 719.
(5) [1901] A. C. 495, 497.

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declaration that an agreement or arrangement that has been made between the defendants, or some of them, for the supply of merchant seamen to vessels controlled by the Shipping Federation, infringes the rights of the plaintiff, and is contrary to public policy and void. The arrangement is one under which in effect the crews of vessels controlled by the Shipping Federation are to be supplied exclusively by the defendants, the National Union, and under which it is in effect a condition of employment on any such vessels that the employee shall be a member of that union. The plaintiff is a member of the Amalgamated Union, which is apparently a union of much more recent origin and much smaller membership than the National Union, and is in competition with it. The defendants, the Shipping Federation, are an association of shipowners who include all, or practically all, the owners of ships in this country except Liverpool shipowners belonging to a somewhat similar Liverpool Association. The defendant Havelock Wilson is the president of the National Union, and the defendant James Clark is a delegate or officer of the National Union employed at the Port of London in the capacity of a Port Consultant for the purpose of seeing to the carrying out of the arrangement in question.

In order to understand the meaning and object of the arrangement that is now being attacked, it is essential to be acquainted with the history of the matter during the last six or seven years. The evidence as to this of Mr. Brett, the secretary of the Shipping Federation, was very clear, and has not been questioned. It appears that in or about the year 1917 the Ministry of Shipping set up an organization known as the National Maritime Board for the purposes of enabling shipowners to obtain crews without difficulty, of removing causes of friction, and of enabling any questions between employers and employed to be dealt with promptly and effectively. On this Board the shipowners were represented by the Shipping Federation, the masters by three societies, the marine engineers by two societies, the navigating officers by three societies, the sailors and firemen by the National Union, and the catering department by a union of their own

—namely, the National Union of Ships' Stewards, Cooks, Butchers and Bakers (hereinafter called the Stewards' Union), of which a Mr. Cotter was the president; and there was an independent chairman of the Board—namely, the Parliamentary Secretary of the Ministry of Shipping. The Board as so constituted succeeded in settling questions in dispute, and also in effecting agreements or arrangements for regulating the conditions of employment and wages and standardising rates of pay at the different ports. Until that time there had been no collective bargaining of the kind, but merely the formation of individual contracts as the result of separate bargains.

Some time after the termination of the war—namely, in the year 1919—the Ministry of Shipping announced that they would have to sever their connection with the National Maritime Board. But, in view of the advantages that had resulted from the activities of the Board, both the Ministry of Reconstruction and the Ministry of Labour urged the shipowners to keep the Board going; and in fact on or about January 1, 1920, the National Maritime Board was reconstituted. A print of its constitution has been put in evidence in this action, and is the exhibit "M.B.1." It is unnecessary to set the contents of this rather elaborate document out in detail, but it is important to notice that one of the objects of the Board is stated as follows: "(c) The establishment of a single source of supply of sailors and firemen jointly controlled by employers and employed in accordance with the following general principles:—(1.) The shipowner shall have the right to select his own crew at any time through a jointly controlled supply office, already established or to be established on a basis to be mutually agreed. Special arrangements to be made by the National Maritime Board to meet special cases such as coasting trade and shipping of substitutes; (2.) Equal rights of registration and employment must be secured for all seamen. Raw recruits to be registered as such; (3.) The seamen shall have the right to select their ship." The representatives on the Board on the employers' side were to be elected by the

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Shipping Federation and the Employers' Association of the Port of Liverpool; the representatives of the various employees were to be elected by their unions as specified in the constitution, the sailors' and firemen's panel being elected by the defendants, the National Union, and the catering department panel being elected by the Stewards' Union. Co-operation in the securing of crews for ships at the various ports, in the prevention of delays, and in the adjustment of local differences was secured by the appointment of Port Consultants representing the employers and the employees respectively. There was power to amend or add to the constitution as the Board might from time to time determine.

The Board appears to have worked smoothly and successfully, generally speaking, down to the present time, but in the year 1921 events occurred which caused a slight change in its constitution. In that year there was a demand on the part of the shipowners for a reduction of wages; and after a long negotiation terms were agreed to in the month of May by all the associations and unions represented on the National Maritime Board with the exception of the Stewards' Union. The members of that union struck, but in the result were unsuccessful; and about the month of August, 1921, shortly after the termination of the strike, the Stewards' Union withdrew from the National Maritime Board, and ceased to have any connection with it. At the beginning of the year 1922 a new union, the Amalgamated Union, was formed by the amalgamation of the Stewards' Union with a small sailors' and firemen's union at Southampton called the British Seafarers' Union. The Amalgamated Union, as its name implies, consists of sailors and firemen as well as stewards and cooks, and after its formation proceeded to open offices at the various ports with a view to embracing all classes of seafarers except officers, and to enlarging its membership as much as possible. The Amalgamated Union and its president, Mr. Cotter, have, to say the least of it, come into keen competition and rivalry with the National Union and its president, Mr. Havelock Wilson. But it has never become a member of the National Maritime Board, and

has never recognized that Board or accepted its decisions officially or as a body, though its individual members may often in fact have had no alternative but to do so. Indeed it appears from the outset to have been opposed to the policy of co-operation and joint supply represented by the National Maritime Board, and to have aimed at upsetting the Board. At any rate, that was the view held, and I think reasonably held, by Mr. Brett and the representatives of the shipowners.

In these circumstances the Shipping Federation recognized or apprehended that, if any considerable proportion of the men employed on their ships were members of the Amalgamated Union, and outside the National Union, they would not be bound by any decision of the National Maritime Board as being unrepresented on it, and there would be a virtual end of the system of collective bargaining, and strikes would almost certainly result. And accordingly the Federation made an arrangement with the National Union that the existing arrangements for the joint supply of men should be varied so that the supply should take place through the National Union, and that for this purpose every man before he was engaged should produce a card or form which should be stamped by the National Union and afterwards stamped by the Shipping Federation. It was not actually stated that every man engaged should belong to the National Union, but it was assumed that only men would be sent who would be bound through their representatives on the National Maritime Board. The card in question was called a P.C. or a P.C. 5 card, the letters "P.C." being derived from the initials of the Port Consultants provided for in the constitution of the National Board. The whole arrangement is very clearly set out in a printed circular dated April 12, 1922, and issued by the Shipping Federation; and it is made plain by another circular dated May 16, 1922, of the Federation that any engagement of a man by an officer should be provisional only, and subject to the man's P.C. card being stamped both by the National Union and by the Federation.

I must next state the particular facts in relation to the plaintiff which constitute his individual claim to relief. His

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ordinary employment is in the engine-room as a greaser. He had at one time been a member of the National Union, but had ceased to contribute to it some time back, and had at the beginning of this year become, as he still is, a member of the Amalgamated Union. On February 20 last he applied to one Stanley Jamieson, the second engineer of the steamship *Demosthenes*, then lying in the Port of London, for employment as a greaser on the then impending voyage of the vessel to Australia. Jamieson, who had had previous experience of the plaintiff and knew him as a reliable man, told him to come to the vessel next day for the purpose of passing the doctor and signing on. The plaintiff attended accordingly, and went with other men into the third-class saloon, where there were present Jamieson, the defendant Thomas Clark, a representative of the National Union, a Captain Bissett, a representative of the Shipping Federation (these two being, as I understand the facts, the two Port Consultants under the National Maritime Board scheme), and another representative or delegate of the National Union. When the plaintiff's name was called by Jamieson he came forward, and Jamieson was prepared, so far as he was concerned, to accept him, subject to an examination by the ship's doctor, but before anything definite was done an objection was raised by Clark that the plaintiff had not a P.C. card. The plaintiff admitted that he had not such a card, and said that he was a member of the Amalgamated Union, and not of the National Union, and, though offered an opportunity of joining the National Union, or rejoining on paying up his arrears, and thereby obtaining a P.C. card, refused to do so. Jamieson thereupon declined to take any further steps to engage him, and the plaintiff failed to obtain the employment he was seeking. There can be no doubt that Jamieson's refusal was due solely to the plaintiff not having a P.C. card, and that had the plaintiff produced such a card, either originally or after he had been required to do so, he would have been passed to the doctor for examination, and, subject to that examination proving satisfactory, would have been engaged. It is clear, therefore, that the plaintiff has suffered some damage by the

requirement that he should produce a P.C. card, and the question is whether he has also suffered a legal injury, that is, in short, whether the arrangement between the Shipping Federation and the National Union is such an invasion of the plaintiff's prima facie right to seek and obtain the employment constituting his livelihood as to amount to a legal wrong.

Mr. Grant for the plaintiff relied on *Temperton* v. *Russell* (1) and *Quinn* v. *Leathem* (2), and, while admitting that neither of these cases completely covered the ground, argued that they established principles sufficient to entitle the plaintiff to succeed here. But in my judgment the present case differs in at least two vital respects from either of those cases. In the first place, the agreement or combination here was not against a particular individual, but merely operated to exclude such individuals as might not from time to time satisfy a qualification which was within the reach of any one who desired employment. The exclusion, that is, was against a class, and that a class to which any one at any time might cease to belong. And in the second place, the motive of the exclusion was not a malicious desire to inflict loss on any individual or class of individuals, but a desire to advance the business interests of employers and employed alike by securing or maintaining those advantages of collective bargaining and control which had been experienced since the institution of the National Maritime Board. In both these respects the present case markedly resembles the *Mogul Steamship Case* (3), and in my opinion the principles laid down in the judgments there are entirely applicable here, and are fatal to the plaintiff's claim.

Indeed, a decision in favour of the plaintiff would lead to a strange anomaly. For many years past no one has questioned the right of a trade union to insist, if they are strong enough to do so, under penalty of a strike, that an employer or a group of employers shall employ none but

(1) [1893] 1 Q. B. 715. (2) [1901] A. C. 495.
(3) [1892] A. C. 25.

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members of the trade union. And the result of any such effective combination of workmen has, of course, been to impose on the other workmen in the trade the necessity of joining the union as a condition of obtaining employment. Here, the employers, instead of being forced against their wills into employing union men only, have recognized that advantages may arise from adopting such a course voluntarily, and have accordingly made an agreement with the trade union to that effect. The incidental result to the other workmen in the trade is the same as if the employers had yielded against their wills instead of agreeing voluntarily. But I fail to see that workmen who are unwilling to join the union have any greater reason to complain of a violation of their legal rights in the second case than in the first.

Mr. Greene, indeed, invited me to go much further, and to say that any body of employers, even the whole body of employers in a trade, had an absolute and unqualified legal right to agree together not to employ an individual or a class of individuals, and that completely irrespective of motive. I am certainly not prepared to go so far, and apprehend that such an agreement, if made maliciously or capriciously, might well amount to a boycott within the reasoning of Lord Lindley in *Quinn* v. *Leathem*. (1) But the facts here render it quite unnecessary for me to adopt any such extreme position as suggested by Mr. Greene.

In the result, therefore, the plaintiff fails as regards his principal claim in this action. A subsidiary complaint by him that the defendants have watched and beset him contrary to s. 7 of the Conspiracy, and Protection of Property Act, 1875, is entirely unfounded, and ought never to have been made. Indeed, at the hearing no attempt was made to support it.

There is, however, a third claim by the plaintiff in relation to a parchment registration certificate issued to him by the Shipping Federation, and as to this I must add a few words. It was suggested that r. 5 of this certificate as set out in the third paragraph of the statement of claim constituted a

(1) [1901] A. C. 495, 542.

contract between the plaintiff and the Shipping Federation, that there had been a breach of this contract by reason of the requirement that the plaintiff should produce a P.C. card as a condition of obtaining employment, and accordingly that the plaintiff was entitled to recover damages against the Shipping Federation, altogether irrespective of the question whether the agreement between the Federation and the National Union was contrary to public policy or not. As regards this claim, the Shipping Federation, while denying that it was properly raised by the pleadings as a separate claim for breach of a contract made for consideration or that they were prepared to meet such a claim in these proceedings, expressly stated that they did not seek to escape from any liability to which they might be subject in this respect, should the plaintiff ultimately succeed in establishing such a case on an issue properly raised for the purpose. It was accordingly suggested by me, and agreed to by the plaintiff and the Shipping Federation, that if judgment should be given against the plaintiff in this action, such judgment should be without prejudice to any proceedings that might subsequently be brought by the plaintiff against the Federation for any alleged breach of any contract suggested to have been constituted between them under the registration certificate in question.

In the result, the action must be dismissed with costs, but words will be inserted in the judgment to prevent the dismissal prejudicing the rights, if any, of the plaintiff in respect of the alleged breach by the Federation of the contract suggested to have been constituted by the terms of the registration certificate or any renewal thereof.

Solicitors: *White & Co.; Botterell & Roche; Frank Daphne, for Alexander Smith, West India Dock Road.*

H. C. G.

TOMLIN J.
1923
Oct. 18.

In re BEST.

PARKER *v.* BEST.

[1923. B. 2796.]

Mortgage—Personal Covenant—Voluntary Assignment of mortgaged Property not purporting to be subject to Charge—Retention by Mortgagees of Debt out of Proceeds of mortgaged Property—Right of Recoupment out of Assignor's Estate.

An assignor mortgaged two policies of assurance on his life with trustees of the insurance company to secure 125*l.* and interest, and entered into a personal covenant for payment thereof. Subsequently he made a voluntary assignment of the policies to his wife, and the deed contained no reference to the mortgage. On the assignor's death the insurance company paid to his widow only the amount of the policies less the debt and interest:—

Held, that the widow was entitled to be reimbursed out of the estate of the assignor the amount so deducted.

In re Darby's Estate [1907] 2 Ch. 465 applied.

ADJOURNED SUMMONS.

Frank Norman Best was on October 23, 1903, entitled to two policies of assurance on his life for 500*l.* each in the Hand-in-Hand Fire and Life Insurance Society free from encumbrances, and by deed dated October 23, 1903, he assigned the two policies to trustees of the society by way of mortgage to secure the repayment of 125*l.* then lent to him out of the funds of the society together with interest as therein mentioned, and he covenanted with the trustees for repayment of the sum of 125*l.* and interest.

By deed dated October 31, 1911, F. N. Best in consideration of his natural love and affection for his wife, assigned (inter alia) the said two policies and all moneys assured by or to become payable under or by virtue thereof to her absolutely subject to the payment of all future premiums thereon. No mention was made of the existing mortgage to secure 125*l.* and interest, and during his lifetime F. N. Best paid the interest on the mortgage debt. He died on May 20, 1922, and on September 11, 1922, the insurance society, which had become known as the Commercial Union Assurance

Society, paid Mrs. Best in respect of the two policies the sum of 873*l.* 8*s.*, being the amount of the policies less the mortgage debt of 125*l.* and accrued interest amounting to 1*l.* 12*s.*

This summons was taken out by the executors and trustees of the will of F. N. Best to have it determined (inter alia) whether Mrs. Best was entitled to be recouped by the plaintiffs as such executors and trustees out of the estate of the deceased for the sum of 126*l.* 12*s.* so deducted by the assurance society from the amount assured by the two policies of assurance assigned to her.

Parton for the summons.

W. M. Hunt for the widow. The debt was a personal debt of the testator, and the policies having been assigned to the widow not subject to the mortgage, the widow is entitled to be recouped the amount deducted from the policy moneys in respect of the debt: *In re Darby's Estate.* (1)

[TOMLIN J. That was a case where the question arose whether there was any right to contribution. That involved the consideration of the equities, and in determining what was equitable the Court could take into account the fact that the debt was a personal debt of one of the parties.]

Here the creditor had alternative remedies against the widow and the testator, but the debt is the testator's debt, and the Court of equity will see that the burden of the debt falls on the right person. Having transferred the property not subject to the mortgage the personal liability of the testator continues. It is a debt of the testator which his estate must pay. The principle of *In re Darby's Estate* (1) therefore applies.

Winterbotham for the residuary legatees. Where there is a voluntary assignment the assignee takes subject to any burden affecting the property assigned: *Ker* v. *Ker.* (2) The log lies where it falls, and if the mortgagee in possession repays himself out of the property charged, the burden of satisfying the debt remains there. There is no principle of contribution between the owner of property charged and the

(1) [1907] 2 Ch. 465. (2) (1869) Ir. R. 4 Eq. 15, 20.

TOMLIN J. person liable on his personal covenant such as was recognized in *In re Darby's Estate* (1) as arising between owners of different estates charged to secure one debt. That case has no application.

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Hunt in reply. A Court of equity always sets its face against allowing the burden of a debt to lie where it happens to fall and determines on whom the debt should in equity fall. In doing so, it is driven to cast the whole burden on the person whose personal debt it was and who is under a personal covenant to pay it.

TOMLIN J. [after stating the facts, continued:] The question is whether the testator's widow is entitled to call on his executors to reimburse to her the sum of 126*l.* 12*s.* retained by the insurance company in payment of their debt. On the one hand, it is said by the widow that she has an equity against the estate to be recouped that amount. On the other hand, it is said on behalf of the residuary estate, the principle applicable is that the log lies where it falls, and the widow cannot therefore come and ask to be reimbursed.

I think whenever a creditor has alternative remedies against two different persons, as, for example, if a debt is charged on properties not all in the same hands or if, as is the case here, the debt is the personal obligation of a debtor and is charged on property in the hands of some other person, then in all those cases equity intervenes to see that the burden of payment falls on the right shoulders. The question therefore arises in this case on whom the burden ought to fall. Prima facie equality or the imposition of proportionate burdens on different properties charged with a debt is equity, but there may be circumstances which disturb the prima facie distribution of the burden and throw it wholly on one person.

My attention has been called to *In re Darby's Estate* (1), decided by Warrington J. In that case the mortgage debt was secured on several properties in different hands, but one of the persons against whom the creditor had a remedy was under a personal obligation to pay the debt. It was

(1) [1907] 2 Ch. 465.

held that the principle of casting proportionate parts of the debt on the different properties was displaced, and that it was equitable that he who was under a personal obligation to pay the debt should bear it. If that be a true expression of the principle governing that case and if also the same doctrine ought to be applied, as I think it should, whenever a debtor has alternative remedies against different persons, then applying it to the facts of this case I must hold that the testator's estate is bound to recoup the widow, as the assignee of the policies of insurance, the money seized on by the insurance company to pay its debt.

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Solicitors: *C. J. Parker & Sloan; J. D. Langton & Passmore.*

H. C. G.

In re MERRALL.

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[1923. M. 1923.]

Administration—Lunatic—Will while compos mentis—Advances to Children and Grandchildren out of surplus Income—Stipulation as to Hotchpot—Discretion of Court of Equity as to enforcing Stipulation.

A testatrix made her will in 1913 and became of unsound mind in 1914, when a receiver was appointed under s. 116 of the Lunacy Act, 1890. From then until her death in 1922 the Master in Lunacy from time to time directed the receiver to make allowances out of her surplus income to various members of the family of the testatrix including sons' wives and grandchildren with provisions for such allowances to be treated as advancements and to be brought into hotchpot against the respective shares, if any, under the will of the testatrix of the recipients or of their husbands or issue. The directions were not made in the presence of the parties who were to be accountable. Some of such parties predeceased the testatrix, others took only life interests, and others again were infants:—

Held, that the directions that the allowances should be treated as advancements and brought into hotchpot were only binding so far as they could affect the consciences of the recipients, and that the Court in administering the testatrix's estate had a discretion not to enforce

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them and would not do so, as by reason of the terms of the testatrix's will and the events which had happened the directions would not do equity.

In re Gist [1906] 1 Ch. 58; [1906] 2 Ch. 280 distinguished.

ADJOURNED SUMMONS.

In 1914 Mary Merrall became of unsound mind, and by an order in lunacy dated May 14, 1914, and made under s. 116 of the Lunacy Act, 1890, her daughter Norah Mary Crawford was appointed receiver of her property. Mrs. Merrall had had issue six children only—namely, the defendants Charles E. Merrall, Alexander James Merrall, a person of unsound mind, Mrs. Crawford, Philip Gordon Merrall, Ethel Maud Brown and Mabel Irene Gaignard. Ethel Maud Brown had died on March 11, 1908, leaving two children, the defendant Luke E. M. Brown and Lucy Mary Kathleen Brown (hereafter referred to as the "Brown children").

The income of Mary Merrall being more than sufficient for her maintenance, orders were made or directions given from time to time by the Master in Lunacy under which Mrs. Crawford as receiver paid out of the surplus income sums by way of allowance to or for certain of Mrs. Merrall's descendants. By para. 5 of the first of these orders dated May 10, 1915, the sum of 3*l.* a week was allowed to each of the following persons for one year from January 1, 1915—namely, Mrs. Crawford, Mrs. Gaignard, Marjorie Merrall the wife of Charles Merrall and Annie Merrall the wife of Philip Gordon Merrall. No question arose as to the payments under this order.

On December 1, 1915, Mrs. Crawford as receiver applied for an order that the sums of 3*l.* a week allowed by the order of May 10, 1915, to these persons might be continued for one year from January 1, 1916, and that the sum of 3*l.* a week might be allowed for the same period for the maintenance and education of the Brown children, "and that all the said allowances of 3*l.* a week each . . . . may be treated as advancements on account of the shares (if any) of" Mrs. Crawford, Mrs. Gaignard, Charles E. Merrall, Philip Gordon Merrall and the Brown children under the will of Mary Merrall, "the

said payments to Marjorie Merrall and Annie Merrall being deemed to be advancements to the said Charles Edwin Merrall and Philip Gordon Merrall respectively." On December 14, 1915, the following directions were given by the Master in Lunacy, no order being subsequently drawn up: "Continue allowances in paragraph 5 of order 10th May 1915 for one year to be treated as advances and brought into hotchpot on death of patient. Allow also 3*l.* a week to the two grandchildren [the Brown children] . . . . as from 1st January, 1916."

On December 12, 1916, a summons was taken out by the receiver asking that the sums of 3*l.* a week allowed by the Master's direction of December 14, 1915, for one year from January 1, 1916, might be continued for one year from January 1, 1917. The summons further asked that the Master's direction of December 14, 1915, might be varied by omitting the direction that such allowances were to be treated as advancements and brought into hotchpot on the death of Mary Merrall. It also asked that a further sum of 52*l.* might be allowed to each of them the said Mrs. Crawford, Mrs. Gaignard, Marjorie Merrall and Annie Merrall for the year commencing January 1, 1917, to be paid by weekly instalments. On January 16, 1917, this summons came before the Master in Lunacy, who directed as follows: "Continue the allowances in paragraph 5 of order 10th May at 4*l.* a week and continue the allowances of 3*l.* a week for the grandchildren for one year. All to be treated as advances and brought into hotchpot."

On December 11, 1917, the receiver took out a summons asking that the sums of 4*l.* a week allowed by the direction of the Master of January 16, 1917, to each of the following persons—namely, Mrs. Crawford, Mrs. Gaignard, Marjorie Merrall and Annie Merrall—might be continued for one year from January 1, 1918, and that the sum of 3*l.* a week allowed by the Master's direction for one year from January 1, 1917, for the maintenance of the Brown children might be continued for one year from January 1, 1918. On December 18, 1917, the summons came on for hearing before the Master in

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Lunacy, and he directed as follows: "Continue the allowances for another year on same terms."

On December 12, 1918, the receiver took out a summons asking that the sums of 4*l.* a week allowed by the Master's direction of January 16, 1917, to each of the following persons, Mrs. Crawford, Mrs. Gaignard, Marjorie Merrall and Annie Merrall, might be continued from January 1, 1919, and that the sum of 3*l.* a week allowed by the Master's direction of December 14, 1915, for the maintenance and education of the Brown children might be continued for one year from January 1, 1919. On December 17, 1918, the summons came on for hearing and the Master in Lunacy gave the following direction: "Continue allowances for one year to children and grandchildren."

Philip Gordon Merrall died on September 26, 1919; and on December 10, 1919, the receiver took out a summons asking that the sum of 4*l.* a week allowed by the direction of the Master on December 17, 1918, to each of the following persons—namely, Mrs. Crawford, Mrs. Gaignard, Marjorie Merrall wife of Charles E. Merrall and Annie Merrall widow of the late Philip Gordon Merrall—might be continued from January 1, 1920; and that the sum of 3*l.* a week allowed for the maintenance and education of the Brown children might be continued from January 1, 1920. It also asked that a further sum of 52*l.* might be allowed to each of them the said Mrs. Crawford, Mrs. Gaignard, Marjorie Merrall and Annie Merrall for the year commencing January 1, 1920, to be paid by weekly instalments. It also asked that a further sum of 20*l.* might be paid to Annie Merrall to meet the funeral expenses of Philip Gordon Merrall. On January 13, 1920, the summons came before the Master in Lunacy, who directed as follows: "Continue allowances and apply again as to increasing them. Pay the funeral and other expenses in case of deceased son." Accordingly on March 22, 1920, the receiver took out a summons asking that the sum of 5*l.* a week allowed by the direction of the Master on January 13, 1920, to each of the following persons—namely, Mrs. Crawford; Mrs. Gaignard, Marjorie Merrall and Annie Merrall—

might be increased to the sum of 8*l.* a week and continued until further order and that the sum of 3*l.* a week allowed by the Master's direction on January 13, 1920, for the maintenance and education of the Brown children, might be increased to 4*l.* 10*s.* a week and continued until further order. "And that the said allowances may be treated as advancements on account of the shares (if any) of the said" Mrs. Crawford, Mrs. Gaignard, Charles E. Merrall "the children of the said Philip Gordon Merrall and the said Lucy Mary Kathleen Brown and Luke Edwin Brown under the will of the said Mary Merrall the said payments to Marjorie Merrall and Annie Merrall being deemed to be advancements to the said Charles Edwin Merrall and the children of the said Philip Gordon Merrall respectively." On March 30, 1920, the Master in Lunacy made an order that in lieu of the former allowances there were to be allowed as from January 1, 1920, to Mrs. Crawford, Mrs. Gaignard, Marjorie Merrall and Annie Merrall annual sums of 416*l.* each and for the maintenance and education of Brown's children the annual sum of 234*l.*, "such allowances to be deemed to be advancements on account of the shares of" Mrs. Crawford, Mrs. Gaignard, Charles E. Merrall, the children of Philip Gordon Merrall and Lucy Mary K. Brown and Luke E. Brown "under the will or intestacy of the said Mary Merrall."

On January 25, 1921, a summons was taken out asking that the annual sum of 234*l.* allowed for the maintenance and education of the Brown children might be increased to 286*l.* as from January 1, 1921, and that the said allowances might be treated "as an advancement on account of the shares (*if* any)" of the Brown children under the will of Mary Merrall. That summons came before the Master in Lunacy on February 9, 1921, and he gave the following direction: "Direction as asked."

One of the Brown children, Lucy Mary Kathleen Brown, died on April 10, 1921. On May 31, 1921, a summons was taken out by the receiver asking that the annual sum of 286*l.* allowed for the maintenance and education of the Brown children might be reduced to the annual sum of 180*l.*

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as from May 1, 1921, owing to the death of Lucy M. K. Brown; and that the said allowance might be treated as an advancement on account of the share (if any) of the said Luke Edwin Brown under the will of the said Mary Merrall. It further asked for payment of the funeral expenses of Lucy M. K. Brown. On this summons coming before the Master in Lunacy on June 8, 1921, he directed as follows: "Pay grandson as asked and funeral expenses and granite curbs."

On December 5, 1921, a summons was taken out asking that the annual sum of 416*l.* allowed by the order dated March 30, 1920, to Mrs. Crawford, Mrs. Gaignard, Marjorie Merrall and Annie Merrall might be reduced as from January 1, 1922, to the sum of 104*l.* each until further order and that the annual sum of 180*l.* allowed for the maintenance and education of Luke Edwin Brown might be reduced to the sum of 100*l.* per annum until further order. The matter came before the Master in Lunacy on December 14, 1921, and an order was made as asked reducing the allowances directed by the order of March 30, 1920, as varied by the direction dated June 8, 1921: "Such allowances continuing to be deemed to be advances on account of the shares of the respective persons mentioned in the said order under the will or intestacy of the patient."

Mary Merrall died on July 5, 1922. Between 1915 and the date of the death the sum of 1825*l.* was paid out of her surplus income pursuant to the above-mentioned orders and directions to each of the said Mrs. Crawford, Mrs. Gaignard, Marjorie Merrall and Annie Merrall, the sum of 953*l.* 6*s.* 8*d.* for the maintenance and education of the Brown children jointly and the sum of 178*l.* 6*s.* 8*d.* for the maintenance of L. E. Brown.

Mary Merrall was found to have made a will dated December 18, 1913, while still compos mentis, and under this will she gave her residuary real and personal estate to trustees upon trust for sale and upon trust after payment of her debts and funeral and testamentary expenses to hold the residue of the proceeds of sale and her ready money in trust in equal shares for all or any her children or child living at her death and for all or any the issue living at her death

who should attain the age of twenty-one years or being female marry under that age of her deceased daughter Ethel Maud Brown or of any other child of hers who should die in her lifetime leaving issue living at her death, such issue to take through all degrees according to their stock in equal shares the share or shares which their parent would have taken if living at her death and so that no issue should take whose parent was living at her death and so capable of taking. And the testatrix declared that the trustees should retain the share of each of her daughters Mrs. Gaignard and Mrs. Crawford in her residuary trust fund upon trust to invest and pay the income thereof to such daughter during her life without power of anticipation during any coverture, and after the death of such daughter to pay such income to her husband (if any) and from and after the death of the survivor of such daughter and her husband (if any) in trust for the issue of such daughter as she should by deed or will appoint and in default of and subject to every such appointment in trust for all or any her children who being male should attain the age of twenty-one years or being female should attain that age or marry in equal shares; and the testatrix further directed that in case such daughter should have no child who should attain a vested interest then her said share should be held in trust in equal shares for the other children of the testatrix living at her death and for all or any the issue living at her death who should attain the age of twenty-one years or being female marry under that age of her said deceased daughter Ethel Maud Brown or of any other child of hers who should die in her lifetime leaving issue living at her death, such issue to take through all degrees according to their stocks in equal shares the share or shares which their parent would have taken if living at her death and so that no issue should take whose parent was living at her death and so capable of taking.

The testatrix's residuary trust fund amounted to about 38,000*l.* Mrs. Gaignard survived the testatrix and died on February 8, 1923, without having had any issue who survived the testatrix.

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This summons was taken out by the sole executor and trustee of the testatrix's will to have it ascertained (inter alia) whether all or any and which or any and what part of the following allowances made under the orders and directions in lunacy ought in the division of the residuary trust fund to be brought into hotchpot or account as against the shares or interests thereinafter referred to (namely) :—

(*a*) as against the shares (original and accruing) of Charles Edwin Merrall the aggregate sum of 1825*l.* 5*s.* 8*d.* paid to his wife Marjorie Merrall.

(*b*) As against the contingent shares (original and accruing) of the defendants John Walker Gordon Merrall and Mary Merrall (infants) the aggregate sum of 1825*l.* paid to their mother Annie Merrall.

(*c*) As against the contingent shares (original and accruing) of the defendant Luke E. M. Brown (infant) (i.) the aggregate sums of 953*l.* 6*s.* 8*d.* paid for his and his sister's benefit jointly and (ii.) the aggregate sum of 198*l.* 6*s.* 8*d.* paid for his benefit alone.

(*d*) As against the capital of the original shares of Mrs. Crawford or (in the alternative) as against the income of such share to which she was or might become entitled or (in the further alternative) as against the accruing share of such defendant in the settled share of Mrs. Gaignard the aggregate sum of 1825*l.* 6*s.* 8*d.* paid to such defendant.

(*e*) As against the capital of the settled share of Mrs. Gaignard or (in the alternative) as against the income of such share down to her death to which she became entitled the aggregate sum of 1825*l.* 6*s.* 8*d.* paid to her.

W. M. Hunt for the plaintiff.

Church for Luke E. Brown. The orders in lunacy can have no effect as regards this defendant and his deceased sister. They were infants, and the orders that the allowances were to be treated as advancements could not bind them.

These orders can only be valid as bargains: *In re Gist* (1); and none could be entered into with infants. In any case the defendant's deceased sister died before the testatrix, so that she took no share to which the orders could apply. This defendant's interest is contingent on his attaining twenty-one years of age. The Court in lunacy has no authority to bind an infant such as the Chancery Division has.

Heckscher for Charles E. Merrall. The allowances directed to be treated as advancements in respect of this defendant's share were all made to his wife. The ordinary principle of advances to children by a parent cannot apply here and the matter must rest purely on bargain. There is no jurisdiction in the Master in Lunacy to add a provision to the testatrix's will. There could be no bargain, as the beneficiaries other than the receiver were not present when the orders were made. It is admitted that if the other parties are bound by the orders and directions, so also is this defendant; but it is contended that as there were in truth no bargains, no one is bound.

Braund for the infant children of Philip Gordon Merrall. Any bargain that allowances to Mrs. Annie Merrall were to be treated as advances was made with Philip Gordon Merrall until his death on September 26, 1919, and his children cannot be liable to account in respect of allowances up till then. As regards later allowances which were directed to be treated as advancements to his children, they were infants and could not be bound by bargain under an order of the Court of lunacy. The gift to the children is not by way of substitution, so that the parent's share could not be treated as coming to them subject to his bargain to treat the allowances as advancements: *In re Gist.* (1) The effect of any such bargain would be at most to charge his share, and he took none: *In re White.* (2) In *In re Scott* (3) the child of a deceased son who would have been liable to bring money into account was held equally liable to account; but there the gift to the child was substitutionary.

(1) [1906] 1 Ch. 58; [1906] 2 Ch. 280.
(2) (1914) 111 L. T. 274.
(3) [1903] 1 Ch. 1.

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Fawell for Mrs. Crawford. There is no obligation to bring the allowances into account. If it was a matter of bargain, it would be difficult to say this defendant was not bound as she was a party to all the orders, but there was only one bargain with her—namely, that all who were receiving allowances should bring them into account. Accordingly if it be held that any of the parties escaped this obligation, she also is released from it. The bargain must stand or fall as a whole. In both *In re Gist* (1) and *In re Frost* (2) allowances were made to the persons actually applying. Further Mrs. Crawford's original share was settled, and she therefore receives no capital against which advancements could be taken into account apart from her accrued interest in a part of Mrs. Gaignard's share, and the accrued interest is unaffected, as the orders and directions went only to Mrs. Crawford's original share. Share must mean share of capital. Any recoupment of the estate out of income might mean an indefinite postponement of distribution, and this cannot be intended. There would be little use in making allowances to this defendant in the testatrix's lifetime and leaving her to starve after the testatrix's death while the income of her share was being used to recoup the estate.

Stamp for Mrs. Crawford's children. It is to the advantage of the infant children from a practical point of view to increase their mother's income. It is contended that she is under no liability to account in respect of the sums allowed her. It is suggested that this provision for bringing into account depends for its binding force on bargain. It is difficult to see what bargain. There can be none between the lunatic testatrix and her children, because the Court of lunacy has no discretion to enter into such a bargain on her behalf. The Court of lunacy may however in benefiting the children out of the lunatic's money impose an obligation to account which is binding only on their consciences. If there were any bargain it must be between the recipients and the Court.

(1) [1906] 1 Ch. 58; [1906] 2 Ch. 280.
(2) (1870) L. R. 5 Ch. 699.

[TOMLIN J. The Court of lunacy having made it a condition of the payments that they should be brought into account, is not the Court administering the testatrix's estate bound to give effect to that ?]

It is not contended that orders of this kind which have been made since 1870 are void. The provision that the recipient should account is a condition imposed by the Court, which is binding on the conscience of the recipient. But when the Court comes to enforce it, it will do so not as matter of contract but as an equity enforceable by it in a proper case. Similarly the Court will enforce a restrictive covenant against an assign with notice of it because it is binding on his conscience. If that be the true view, the Court will have a discretion as to enforcing this equity and will take all the conditions into consideration, just as in the case of a restrictive covenant the Court may refuse to enforce it against an assign if there has been a complete alteration of the amenities of the locality: *Knight* v. *Simmonds.* (1) If here the Court were to come to the conclusion that the conditions now that the testatrix's estate comes to be administered are entirely different from what was contemplated when the conditions were imposed, there is nothing to prevent the Court saying that it is no longer binding on the recipients' consciences. The condition was obviously intended to effect equality, but by reason of death, settlements of shares and other considerations it would fail to have that effect.

[TOMLIN J. The effect of refusing to enforce these orders will also be to cause inequality. No allowances were ever made to the son Alexander.]

He was of unsound mind and otherwise amply provided for. In any case the orders cannot be enforced against income of a settled share. The intention of the orders is clearly that the allowances must be brought into hotchpot against capital: see also *In re Scott* (2); *Hatfeild* v. *Minet.* (3)

Potts for Alexander J. Merrall. The suggestion that the

(1) [1896] 2 Ch. 294. (2) [1903] 1 Ch. 1, 10.
(3) (1878) 8 Ch. D. 136, 144.

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bargain, if such it be, cannot stand, unless it stands as a whole, is contrary to *In re Gist.* (1) So also is the view that the recipient of an allowance is only under an equitable obligation, which the Court will not enforce if the result is not equality. The real position is that the direction to bring allowances into account against the respective shares adeems those legacies pro tanto. The receiver acting under the direction of the Court of lunacy is in the same position as if she were the patient herself; and the patient having by will given certain legacies, the Court can direct on her behalf that sums paid to the legatees in her lifetime are to go in ademption. All that is referred to effect ademption is evidence of an intention to adeem: *In re Ashton* (2); *In re Eardley's Will.* (3) So here there has been payment by an authorized person with intention to adeem.

As regards Mrs. Crawford's share, it makes no difference that it is settled. A settled share can be adeemed: *Kirk* v. *Eddowes.* (4)

[TOMLIN J. I feel great difficulty in saying that the intention of the Master in Lunacy must be treated as the intention of the testatrix.]

If not, and the view prevailed that the orders only imposed an obligation binding on the consciences of the recipients, the Court ought to enforce it. Further it would be binding on the consciences of all interested in each share. But even if not, it must be enforced as far as possible: *In re Gist.* (1)

TOMLIN J. The question which falls to the Court to decide in this case is of a somewhat unusual and difficult nature. [His Lordship stated the facts and continued:] It is to be observed that so far as the orders and directions in lunacy are concerned they were all made upon the application of Mrs. Crawford, who was the receiver appointed in lunacy, and not in the presence, as I am told, of any of the parties interested. On the other hand, the adult parties who received

(1) [1906] 1 Ch. 58; [1906] 2 Ch. 280.
(2) [1897] 2 Ch. 574; [1898] 1 Ch. 142.
(3) [1920] 1 Ch. 397, 404.
(4) (1844) 3 Hare, 509.

the allowances I have little doubt were familiar with the circumstances, and took them knowing the terms upon which they were granted by the Master.

The question which I have to determine here to-day is whether any and what regard is to be had to those allowances in distributing the estate of the testatrix. Probably what was present to the mind of the Master in Lunacy in making those orders was that the estate of the testatrix was presumably coming to her children in equal shares, and that it was desirable in order to produce equality to arrange that the allowances made in the lifetime of the testatrix should be brought into account on the ultimate distribution of her estate in those shares. But it is plain that by reason of the events which have happened the directions which were given by the Master, whatever their precise effect may have been, cannot take literal effect. Take for example the case of the allowance to Mrs. Annie Merrall, the wife of Philip Gordon Merrall. Up to the point when Philip died the direction appears to have contemplated that the allowances made to Philip's wife were to be deducted from Philip's share. Philip died, and therefore never was in the position to receive a share at all. The allowances to his widow were continued. The scheme so far as it related to the allowances to the widow up to the death of Philip therefore failed, and effect could never be given to it; but after the death of Philip the allowances to the widow were directed to be treated as advancements on account of the children. That of course gives rise acutely to the question how far any of the parties interested in the testatrix's estate are entitled to-day to say that by reason of that direction the shares of those infants in the testatrix's estate can be charged with an obligation to bring into account the allowances made to their mother. There is a further question which arises in connection with the two Brown children. A single sum by way of allowance has for years been paid to the two Brown children for their maintenance and education, and it is said that it is to be treated as an advance in respect of their shares. One of them died and never became entitled

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to a share. A lesser allowance was continued to the survivor. How does the survivor stand? Is he fixed with a liability to account for the whole of the joint allowances made to him and to his sister who has died?

It seems to me that these problems necessitate the consideration of the question: what is the real basis (if any) upon which the Court of Chancery in administering the estate of the testatrix will give effect to directions such as those to which I have referred? Three alternative theories have been advanced at the Bar; one is that it is a matter of bargain and that each of these persons who received allowances had contracted to account when they come to receive their share of the estate for the sums advanced. Reference has been made to *In re Gist.* (1) It may very well be that the circumstances in that case were of such a character that there was imposed upon the recipients of the allowances something in the nature of an obligation. There the orders made in lunacy had been made in the presence and with the consent of the parties beneficially interested, and that may fairly have justified the language used by Swinfen Eady J.—I am sure the language would not have been used unless it was justified—when he referred to the condition imposed upon each recipient as a "bargain." But it by no means follows that such language can be appropriately applied to the facts of this case, and in my view it cannot. It seems to me plain that there was not a bargain in any sense of the word, that is, something creating a legal obligation binding on two sides. The whole of the transaction was put through by the receiver in the absence of any of the other parties, although I have no doubt with the knowledge and approval of the adult members of the family. If there was a bargain, with whom was it made, and was it a bargain under which the parties who entered into it were entitled to bargain away not only their own rights but the rights of their children? I do not think that in the circumstances of this case it can be said that there was anything in the nature of bargain at all.

(1) [1906] 1 Ch. 58; [1906] 2 Ch. 280.

Another theory advanced is that when a testator has become insane the Master in Lunacy is in matters of this sort the testator and can adeem the testator's legacies. I am putting the contention in an extreme form, but in substance it comes to that. It is contended that if the Master in Lunacy says: "I make you this payment on the footing that it is to go in satisfaction of any legacy which the testator may have left you by his will," that operates as a complete and effectual ademption. I do not think that there is any authority which justifies such a conclusion with regard to the position of the Master. It seems to me that the Master's jurisdiction is much more limited, and that it would be wrong to say that administrative acts, such as those we are considering, are to be treated as though they were the expression of an intention on the part of the testator to vary the testamentary dispositions made by him before his mental incapacity occurred. Therefore I am unable, I think, to obtain any assistance from the authorities to which I was referred by Mr. Potts, which would only be relevant if that theory were well founded.

There remains one other theory. It is that the matter at the most rests in conscience, as being a case of the kind where a beneficiary under a will has been party to extraneous transactions which give rise to considerations entitling this Court to compel him to forego some of his rights. In other words, it is said that where an order of this kind is made by the Master in Lunacy it will be recognized and enforced in this Court because it would be against good conscience not to give effect to it. If this is the true theory, as I think it is, it must necessarily involve this Court having a discretion whether it will give effect to it or not, and being free to say that if the circumstances have so altered that to enforce it will produce not the equality anticipated but an inequality greater than if it were not enforced, then it will not be enforced at all. I cannot help thinking that in giving these directions the Court in lunacy was looking at the thing as a whole, and that the probabilities are that the condition as to accounting would have been omitted altogether if it had been

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appreciated that in the case of a number of the recipients of allowances the condition could never be enforced.

In this case some of the directions cannot be given effect to at all and some cannot be regarded as affecting the consciences of those sought to be charged. The allowances which were made for example to the wife of Philip cannot be enforced against Philip because he had no share, and they cannot be enforced, as I hold, against his infant children who were not parties to the transaction or capable of having their consciences affected by any equity. So with regard to the Brown children. One of them is dead and has never had any share, and the allowances which were paid to the one who is dead cannot be charged against the one who survived, but who did not have the full benefit of the allowances. Take again Mrs. Crawford, who has not taken under the will a share in the capital at all, but has taken nothing except a life interest. I am omitting for the moment the consideration of the fact that she may have an unsettled accruing interest in part of her sister's shares. Is the condition to be enforced against her on the footing that the whole of her income is to be seized upon over a series of years? Or is it to be enforced against her children, and if so, upon what principle are the rights of the children affected by reason of the direction of the Master in Lunacy? I can see none, and I cannot hold that their share is affected. Having regard then to all these circumstances, I come to the conclusion that the least inequality will be effected by ignoring the whole of those directions in toto. I propose therefore to deal with the case in that way, and to direct that the estate be distributed without regard to any of the directions contained in those orders.

Solicitors: *Corbin, Greener & Cook; Church, Rackham & Co.; Marris & Shepherd.*

H. C. G.

EVE J.
1923
Oct. 15.

In re SAMUDA'S SETTLEMENT TRUSTS.

HORNE *v.* COURTENAY.

[1923. S. 2517.]

Settlement—Special Power of Appointment—Will—Exercise of Power—Income for Life to Three Children "and the survivors of them"—Contingent Interest—Rule against Perpetuities—Residuary Gift.

A testatrix who, at the date of her death, was tenant for life of certain funds held by the trustees of a settlement made in 1855, under which she had a special power of appointment amongst her children or remoter issue, purported to exercise the power by her will and appointed that after her decease the income of the trust funds should be divided between her three daughters therein named "and the survivors of them," or such of them as might continue unmarried, and on the death or marriage of the last survivor of the three the trust funds were to be divided between the same three daughters or such of them as should be living and the issue then living and born in the testatrix's lifetime of such of them as should be dead leaving issue born in her lifetime. At the date of the settlement of 1855 none of these children had been born. The will contained a residuary bequest of all her property over which she had any power of testamentary disposition to her husband during his life, and subject thereto she gave the same equally between her three daughters. There were six children of the marriage who all survived the husband of the testatrix. He was not an object of the power, and died in 1910. One of the three daughters named in the will died in 1917 unmarried, and the other two were still living. Upon a summons by the surviving trustee of the settlement of 1855 to have it determined amongst whom and in what proportions the capital and income of the trust funds should be divided:—

Held, that the appointment to the three daughters of one-third each for life or until marriage was good, but the cross-gift of the life interests to the survivors of them was a contingent and not a vested interest and infringed the rule against perpetuities; and on the death of each daughter the corpus of the share in which she took a life interest was divisible amongst the three daughters or their representatives.

Whitby v. *Von Luedecke* [1906] 1 Ch. 783 followed.

Held, further, that the funds, in so far as they were not effectually appointed by the clause purporting to execute the power, were caught and disposed of by the residuary clause, and the corpus was divisible in thirds amongst the three daughters.

By a settlement dated February 8, 1855, a sum of 3000*l.* New 3 per cent. Bank Annuities was directed to be held by the trustees thereof upon trust as to one equal third part of the same to pay the interest, dividends and annual

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proceeds therefrom to Esther Anna Samuda for her life for her separate use, and after her death in trust for such of her children or remoter issue born in her lifetime who should live to attain twenty-one or in case of daughters should marry under that age in such shares and proportions as she should by deed or will appoint and in default and subject to every such appointment for her children equally. Another one-third was to be held upon trust for Henrietta Samuda and her children or remoter issue for such and the like interests and subject to the like powers as those declared concerning the first one-third; and the remaining equal one-third was to be held upon trust for the benefit of Laura Courtenay and her children or remoter issue for such and the like interests, and subject to the like powers. In case any or either of the three children should die without issue who should become entitled under the trusts, the share or shares, as well original as accruing, of her or them so dying should be held in trust for the survivors or survivor of them and their or her children or remoter issue. By this same settlement a further sum of 1820*l.* Reduced 3 per cent. Annuities and the interest, dividends and annual proceeds thereof was settled upon the like trusts as the 3000*l.*, and it contained a hotchpot clause. E. A. Samuda married in 1860, but died in 1890 without issue, and H. Samuda died in 1877 without having married. Whereupon Laura Courtenay and her issue became entitled to the entire funds. Laura Courtenay died on June 28, 1892, after having married George Henry Courtenay, by whom she had six children, who were all living at her decease and all survived her husband. By her will dated August 5, 1889, Laura Courtenay appointed executors, and after referring to the powers vested in her by the said settlement over the two funds therein mentioned by virtue of such powers and of every other power her enabling directed and appointed that after her decease the income of the whole of the aforesaid trust funds should be divided between her three daughters, the defendant Catherine Laura Courtenay, Anne Henrietta Courtenay, and the defendant Elizabeth Frances Courtenay "and the survivors of them," or such of them as might

continue unmarried until all three daughters should have died or married, and upon the death or marriage of the last of them the testatrix directed that the whole of the trust funds should be divided equally between her said three daughters if living, or such of them as should be then living and the issue then living and born in the testatrix's lifetime of such of them as should be dead leaving issue born in her lifetime, such issue to take per stirpes and not per capita. And the testatrix bequeathed all the residue of her property over which she had any power of testamentary disposition to her husband, J. H. Courtenay (if he survived her), during his life, and subject thereto she gave the same equally between her said three daughters, or such of them as should be living at the time of her decease, or the decease of her husband, whichever event should last happen. The testatrix's husband died on January 2, 1910. Anne Henrietta Courtenay died on February 22, 1917, unmarried. From the death of the testatrix down to 1917 the income of the investments representing the settled funds was divided by the trustees equally between the three daughters of the testatrix, and from 1921 onwards the capital had been divided between the two surviving daughters. Doubts having arisen as to the validity of the appointment, and as to its effect, an originating summons was taken out by the surviving trustees of the settlement of 1855 to have it determined among what persons and in what proportions the capital and income of the trust investments contained in the settlement and appointed by the will of Laura Courtenay ought to be divided.

L. W. Byrne for the trustee of the settlement.

Gover K.C. and *R. Gilbert* for children of the testatrix interested in such part of the funds as was not validly appointed.

No effective appointment has been made by the will and the funds go in default of appointment. The appointment infringes the rule against perpetuities, and if so the question is whether or not the residuary gift operates as an effectual exercise of the power, and what is the effect of it? On the

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first point the gift of the corpus in remainder to the survivors of the daughters is bad as a contingent remainder. As to the gift of the life interests they are only good during the joint lives of the three daughters named, that is down to February 22, 1917, when the first of them died. The case comes within the decision of Buckley J. in *Whitby* v. *Von Luedecke* (1), and the appointment of the life interest after that date is bad, and the ultimate gift over of the corpus is also bad. As to the residuary gift, the gift for life to the husband is bad, he not being an object of the power, and the bequest does not operate as an exercise of the power of appointment.

J. W. F. Beaumont for the representative of the deceased daughter submitted that the residuary gift took effect on all that was not effectually appointed, as the exercise of the special power was not in terms exhausted.

Hewitt K.C. and *J. M. Paterson* for the two surviving daughters. We do not deny that the ultimate gift over of the corpus of the fund on the death or marriage of the last survivor of the daughters is bad as infringing the rule against perpetuities. But the gift of the income to the survivors of the daughters is good, being a vested interest always ready to come into operation. The case of each daughter ought to be considered separately, and then the only contingency would be that which is already imported into the gift by the use of the word "survivors," and must of necessity be implied in any gift of a life interest in remainder. It comes within *Gooch* v. *Gooch* (2) and Lord Cranworth's dictum and observations in that case. *Ashley* v. *Ashley* (3) also supports the contention that cross-remainders for life may be given to unborn persons, and the gift in the present will is to the same effect. Property may be given to several unborn persons successively for life with remainders over, provided that such remainders are vested in persons ascertainable within the limits prescribed by the rule against perpetuities: *In re Ashforth* (4); Gray on The Rule against Perpetuities,

(1) [1906] 1 Ch. 783.
(2) (1853) 3 D. M. & G. 366, 383.
(3) (1833) 6 Sim. 358.
(4) [1905] 1 Ch. 535, 540, 541.

3rd ed., pp. 181, 253 (ch. 207); Theobald on Wills, 7th ed., p. 575, 604; Jarman on Wills, 6th ed., 349.

On the question of the effect of the residuary gift in the will we submit that it is a valid execution of the power and sweeps up both corpus and income and replaces what was ineffectually disposed of by the prior gift in the will: *In re Hunt's Trusts* (1); *Wollaston* v. *King*. (2)

Gover K.C. in reply referred to *In re Crichton's Settlement* (3); *In re Ramadge's Settlement* (4); and Lord Halsbury's Laws of England, vol. xxii., 336, 337.

EVE J. At the date of her death on June 28, 1892, the testatrix Laura Courtenay was tenant for life of certain funds invested in the names of trustees, over which she had a special power of appointment in favour of her children or remoter issue. In default of appointment the funds went in the usual way to the children at twenty-one or, in the case of daughters, on marriage under that age. The funds were settled by a post-nuptial settlement dated February 8, 1855, at which date none of the children except the eldest son had been born. By her will of August 5, 1889, from which it might almost be deduced that the settled funds constituted the whole of her estate, the testatrix, after fully reciting the power, purported to exercise it in the following terms. [His Lordship read the appointment and continued:] The appointment of the corpus is admittedly bad as infringing the rule against perpetuities. It is also to be observed that the testatrix in exercising the power has not provided for at least one contingency, and that in the event of the death of each of the three daughters without issue the funds would go as in default of appointment unless caught by the residuary clause which follows, and is in these words: [His Lordship read the clause and continued:] There were six children of the lady and her husband, all of whom were living when the husband, who survived the wife for many years, died on January 2, 1910. Any unappointed interest in the funds would therefore

(1) (1885) 31 Ch. D. 308.
(2) (1869) L. R. 8 Eq. 165.
(3) (1912) 106 L. T. 588.
(4) [1919] 1 I. R. 205.

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be divisible into equal sixth shares. The first question is whether the funds, in so far as they were not effectually appointed by the clause purporting to exercise the power, were caught and disposed of by the residuary clause. In my opinion, they were. One cannot read this will without seeing that the testatrix knew about and intended to exercise the power, and I think it is equally clear that, subject to the gift to her husband of a life interest in residue, she intended her property to go to her three daughters, to the exclusion of her sons. The residuary clause is, in my opinion, so framed as to provide against any events in which the prior attempt to exercise the power might fail; and although it cannot operate to give the husband a life interest in the funds, as he is not an object of the power, it is none the less a valid exercise of the power so far as the earlier attempt has failed in favour of the three daughters. The result is that the corpus of the funds falls to be divided under the residuary gift in thirds amongst the three daughters and those claiming under them. [So far the case does not, I think, present much difficulty, but there remains the more debatable question, whether the appointment of the income to the three daughters "and the survivors" is void to any and if so what extent? It is conceded that no valid objection can be raised to the gift to each daughter of one-third of the income during her life. But one of the daughters died in 1917, and the question is whether the gift of her share of the income to the survivors after her death is vested, in which case it is effective, or contingent, in which case it is void in that it may not come into effect within the period limited by the rule against perpetuities. I think it is clear that if the case of *Whitby* v. *Von Luedecke* (1) was rightly decided the circumstances of this case bring it within that decision.

The facts are exactly similar, except that here there are three daughters and in that case there were only two. I am free to confess that if the construction were unfettered by that authority I should have had some difficulty in arriving at the conclusion that the interest which each

(1) [1906] 1 Ch. 783.

daughter took in the income of the shares of the others on their respective deaths was not a vested remainder. I cannot help thinking that the nature of the interest ought—as Mr. Hewitt has argued—to be ascertained by considering the case of each daughter separately and not by grouping them together, and if each daughter's interest is so examined the only contingency in the life interest in remainder would be that which is already imported into the gift by the use of the word "survivors," and which must necessarily be implied in any gift of a life interest in remainder.

But the case I have referred to was decided in 1906. It may be that it has not met with the universal approval of the profession and has been criticised by text writers, but on the other hand no case has been cited casting any doubt upon its authority, and on a previous occasion I had to consider the matter, and came to the conclusion that until a higher authority pronounces it to be unsound I ought not to depart from the construction imposed by Buckley J. upon a limitation of this nature. I ought to add that his view has been followed in parallel circumstances in Ireland in *In re Ramadge's Settlement* (1) and adopted by Neville J. in *In re Crichton's Settlement.* (2)

Upon this point then I feel myself precluded from pronouncing any judgment contrary to the decision in that case, and accordingly I hold that the cross-gift of life interests to the survivors was a contingent and not a vested interest. The result is that on the death of each daughter the corpus of the share in which she took a life interest is divisible amongst the three daughters or their representatives.

Solicitors: *Wansey, Stammers & Co.; Firth & Co.; Gamlen, Bowerman & Forward.*

(1) [1919] 1 I. R. 205. (2) 106 L. T. 588.

G. M.

EVE J
1923.
Oct. 15.

In re CUNNINGTON.

HEALING *v.* WEBB.

[1921. C. 4164.]

Conflict of Laws—Will—Construction—French Domicil—English Will—Rule of Interpretation—Exception—Residuary Bequests.

By his will made in English form in England a testator, who described himself as a British subject then residing in France, bequeathed to his sole executor, who was English, all his estate upon trust for conversion, and after payment of certain legacies to domestic servants, to divide all the residue of his estate equally between ten named legatees; and if any of such legatees died in his lifetime the legacy was to belong to the issue of such person. The testator died in France, and his will was proved in England. Two of the residuary legatees died in his lifetime, but neither left any issue. There was no realty and the property comprising the residue was in England. The residuary legatees were all English. On a summons before Eve J. the domicil of the testator at his death was held to be French. By French law there was no lapse of the shares of those legatees who had died, and the survivors were entitled:—

Held, that the domicil being French and there being no sufficient indication in the will, either express or implied, that the testator desired that it should be construed by English law, the prima facie general rule applied, and the will must be construed by French law.

Held, therefore, according to that law that there was no lapse of the two tenth shares, and the whole residue went to the eight surviving legatees.

By his will dated August 12, 1915, the testator, James Cunnington, who therein described himself as "at present residing at Au Grand Cerf, Lamorlaye, Oise, France, retired trainer, a British subject," appointed the plaintiff, Charles Alfred Healing, of Denmark Hill, London, E.C. [*sic*], and of the Royal Courts of Justice, Strand, to be sole executor of his will, and bequeathed to him all his real and personal estate whatsoever and wheresoever upon trust to call in and collect the same, and after the payments therein mentioned, including certain legacies to domestic servants in France, and a direction to release certain mortgage debts and to reconvey the mortgaged hereditaments, the testator directed his executor to divide all the rest and residue of his estate equally between

ten named legatees, and he directed that in case any of such residuary legatees should die in his lifetime the legacy thereby given to the person so dying should belong to the issue of such person.

The testator died on July 7, 1919, at Vichy in France, and his will was duly proved on August 2, 1919, by the executor in the Principal Probate Registry in England. Two of the residuary legatees named in the will died in the testator's lifetime, but neither left any issue.

There would be a lapse of these shares by English law, but according to French law the eight surviving legatees would take the whole residuary estate. The testator was never naturalized in France; he had a banking account at the Société Générale in Paris and also one at the Newmarket Branch of Barclays Bank. The French property at the time of the testator's death amounted to 15,600*l.* in value and the English property to 21,060*l.* Duty had been paid in France on the whole estate. An originating summons was taken out by the plaintiff on September 29, 1921, asking for (inter alia) (1.) an inquiry as to what was the testator's domicil at the date of his death; (2.) whether, on the true construction of the will and in the events which had happened, two-tenths of the residuary personal estate were undisposed of, or whether the first eight residuary legatees who were defendants were entitled to the whole of the residuary estate. On April 20, 1923, Eve J. found that the testator was domiciled in France at the date of his death (reversing the Master's finding). The residuary estate was in England.

The second question on the summons was now before the Court.

W. F. Webster for the sole executor of the will.

Gover K.C. and *Farwell K.C.* for the eight surviving residuary legatees under the will. The domicil of this testator being French the rule is well established that in the case of movables the will must be construed according to the law of the domicil: Dicey's Conflict of Laws, 3rd ed., pp. 731, 732 (R. 196).

There is an exception, or rather qualification, to that general

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rule to this effect, that where the will contains expressions in the technical terms of the law of a country where the testator is not domiciled and the matter is being dealt with in that country, the Court will construe these particular expressions according to the law of which they form a part. But that exception is inapplicable in the present case in that there are no technical terms or expressions in this will—such as a reference to the Statute of Distributions—which would require explanation; it can be construed quite easily in French, the gift being of the residue to ten named persons equally: Westlake's Private International Law, 6th ed., pp. 151, 152; *In re Price* (1); *Bradford* v. *Young* (2); *Anstruther* v. *Chalmer*. (3)

Two of the legatees having died in the testator's lifetime the ordinary law of France applies, and there is a perfectly good gift to the remaining eight legatees. It is construed as a class gift, and there is no lapse.

[Evidence of French experts was read to this effect and was uncontradicted.]

G. D. Johnston for two of the next of kin of the testator. Many of the expressions in this English will are unknown to a French Court and must be construed according to English law. There is a lapse of the shares of the two beneficiaries who died.

Bryan Farrer for another of the next of kin. Accepting the general rule as to the construction of a will of movables, which is only a canon of interpretation, I submit that if the Court finds either an express or implied intention on the part of the testator that his will should be construed according to the law of the country of which he is a national, it will give effect to that intention. This is a purely English will in English form and contains expressions to be construed by English law such as "issue"; the sole executor is English; the named beneficiaries are all English, and a mortgage debt has to be released; it would be unintelligible under French law. There is such an implied intention by the testator as

(1) [1900] 1 Ch. 442. (2) (1884) 26 Ch. D. 656; 29 Ch. D. 617.
(3) (1826) 2 Sim. 1.

was referred to by Stirling J. in *In re Price.* (1) The law is, I submit, correctly stated in Dicey's Conflict of Laws, 3rd ed., p. 732, and especially where, referring to the exception to the general rule, he states as an example of it that where an Englishman domiciled in France executes a will there leaving his money on an English trust to be executed in England and the will is expressed in the technical terms of English law, the will would be interpreted according to that law. A similar opinion appears in Theobald on Wills, 7th ed., p. 5, where it is stated that the law of the domicil is to prevail "unless the testator indicates that the will was intended to take effect with reference to some other law." In *Anstruther* v. *Chalmer* (2) this particular point was not argued at all. The next of kin are therefore entitled, according to the law of England, to these two lapsed shares.

Gover K.C. in reply referred to *In re Miller.* (3)

EVE J. The testator died on July 7, 1919, an English subject domiciled in France, having made a will on August 12, 1915, in England and in English form, whereby he disposed of his residuary estate in these terms: [His Lordship read the residuary gift in the will.] Two of the residuary legatees died in his lifetime without issue, and if the will is to be construed according to English law, there was an intestacy as regards two-tenths of the residue. But as the testator died domiciled in France his will, so far as personal estate is concerned, ought prima facie to be construed according to French law, and if so, it is admitted that there is no intestacy and that the whole residue is equally divisible amongst the eight surviving legatees. The real question I have to decide is whether there is any sufficient evidence of an intention on the part of the testator to exclude the operation of the prima facie rule I have mentioned. On behalf of the next of kin it has been argued that if the whole will is looked at and its contents examined it is obvious that this Englishman

(1) [1900] 1 Ch. 442, 453. (2) 2 Sim. 1.
(3) [1914] 1 Ch. 511, 518.

EVE J. 1923 CUNNINGTON, *In re.* HEALING *v.* WEBB.

must have contemplated and intended that it should be construed according to English law. It is certainly a will which would accurately be described as an English will, the benefactions are given almost exclusively to English persons resident in England, the only exceptions being the testator's domestic servants, and finally the property comprising the residue is in England. Does this combination of circumstances exclude the rule? I do not think it does—indeed I think the authorities show that it does not. The facts in *Anstruther* v. *Chalmer* (1) were very similar. There the testatrix, a Scotswoman who died domiciled in England, had made a will in Scotland and in Scotch form containing many expressions peculiar to Scotch law. Amongst other bequests was an absolute one to a legatee who predeceased her. According to English law that bequest would have lapsed, but not so according to Scotch law; and on behalf of those claiming under the legatee it was argued that having regard to the facts that the instrument was made in Scotland, in Scotch form and by a lady of Scotch nationality, it was obviously intended to be construed according to the law of Scotland. The Vice-Chancellor however held that there were no sufficient grounds for not construing the will by the law of the domicil.

In *Bradford* v. *Young* (2) it was said by the Court of Appeal that if it could be ascertained, either by direct statement in the will or by a combination of circumstances, that the testator intended to exclude the operation of the rule the Court was bound to give effect to that intention. As I cannot find anything here which, either directly or by implication, establishes an intention to exclude the rule, the will falls to be construed according to the law of the domicil and the residue goes to the eight survivors.

Solicitors: *Barfield & Barfield; Martineau & Reid; Fitch & Cooper, for Button, Aylmer & Co., Newmarket.*

(1) 2 Sim. 1. (2) 29 Ch. D. 617.

G. M.

EVE J.
1923
Oct. 16.

In re STANFORD.

UNIVERSITY OF CAMBRIDGE *v.* ATTORNEY-GENERAL.

[1923. S. 2473.]

Charity—Will—Gift for express Purpose—Surplus Fund—Cy-près—Residuary Legacy—Absence of general charitable Intention—Resulting Trust.

By his will, made in 1876, a testator gave 5000*l.* Consols to Cambridge University, to be transferred to the University if accepted "upon trust to be applied for the express purpose of carrying on to completion and publication my Etymological Dictionary of Anglicised Foreign Words and Phrases," should the same be incomplete at the time of his decease, they applying the annual dividends towards the completing and publishing of the Dictionary. The testator constituted one of his executors residuary legatee and died in 1880. The University accepted the bequest on the terms and for the purpose specified, and published the Dictionary in 1892. After all payments had been made in connection with the publication there remained over a surplus of 1151*l.* 14*s.* 10*d.* Consols and 230*l.* derived from income and sales of the Dictionary. Upon a summons by the University asking how this surplus should be applied:—

Held, (1.) That there was no conditional bequest to the University, who were made trustees of the fund for an express purpose, and they were not entitled to the surplus beneficially.

(2.) That in the absence of any general charitable intention to be gathered from the terms of the bequest there was no room for the application of the doctrine of cy-près, and there was a resulting trust for the testator and those claiming under him of the surplus moneys.

By his will, dated September 30, 1876, John Frederick Stanford, of Lincoln's Inn, Barrister-at-law, and Master of Arts of Cambridge University, after appointing his cousin William Henry Kerr and other persons executors and trustees of his will, among other bequests gave and bequeathed 5000*l.* Consols (3 per cent. Government Stock) free of all duties to the Chancellor, Masters and Scholars of the University of Cambridge, if accepted by them on the terms and conditions thereinafter expressed, to be transferred to them and to be held "on trust by them to be applied for the express purpose of carrying on to completion and publication my Etymological Dictionary of Anglicised Foreign Words and Phrases, should the same be

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incomplete at the time of my decease, they applying the annual dividends towards the completing this my Dictionary and publishing the same"; and they were empowered to sell or to enlarge and extend the Dictionary, or to contract with any publishers for the completion and publication and to apply the above-mentioned sum in payment to such publisher; and should the Chancellor, Masters and Scholars of Cambridge University decline to accept the bequest, then the testator desired his executors and trustees to make the offer of the 5000*l.* upon the same terms to the University of Oxford, and should they also decline, the testator left it to his executors and trustees to do the best they could in some other way to effectuate his wishes. After further dispositions he constituted William Henry Kerr his residuary legatee.

The testator died on December 2, 1880, and his will was proved by W. H. Kerr and the other executors. The bequest was accepted in due form by the University, and the 5000*l.* Consols were accordingly transferred to the plaintiffs, and the Dictionary was published in 1892. After all payments in connection with the publication had been made there remained a surplus over of 1151*l.* 14*s.* 10*d.* Consols. A further sum of 230*l.* derived from income of the surplus and from sales of the Dictionary had also been invested.

William Henry Kerr, the testator's residuary legatee, died on March 9, 1903, having by his will appointed four of the defendants his executors. Questions having arisen as to the manner in which the surplus capital and income of the investments should be applied, the plaintiffs took out an originating summons asking whether the capital and income of these investments (*a*) ought to be applied by them in providing for the revision, improvement and republication of a revised and improved edition of the Dictionary, or (*b*) are applicable free from the provisions contained in the bequest, for carrying out such University purposes as the plaintiffs think fit, or (*c*) are applicable cy-près for purposes analogous to those declared by the testator, or (*d*) ought to be held upon the trusts in the testator's will declared concerning his residuary estate.

Gover K.C. and *W. J. Whittaker* for the plaintiffs. The gift to the University is a charitable gift. We contend, in the first place, that it is an absolutely beneficial gift to them, subject to the condition of completing and publishing of this book. Those conditions were accepted and fulfilled, and the surplus belongs to the University for general purposes. If wrong in this contention then we submit that the surplus should be applied cy-près. On the first issue the prima facie rule is stated in Tudor's Charitable Trusts, 4th ed., p. 122. In *Attorney-General* v. *Trinity College, Cambridge* (1) the college was held entitled to surplus rents of property given for a charitable purpose. *Merchant Taylors Co.* v. *Attorney-General* (2) also applies. It is open to the University to reissue or reprint the book in the future and to apply the surplus fund for that purpose.

On the question of applying the fund cy-près, there is a general charitable intention expressed in this will. In the latest case on this point: *In re King* (3), the surplus of residue given by a testatrix to provide for the erection of a stained-glass window in a parish church was held to be applicable cy-près. In *In re Packe* (4) a particular charitable trust was found impracticable, and as no paramount general intention could be implied the charitable bequest failed. That was a different case altogether from the present.

[EVE J. What evidence is there of any general charitable intention here beyond the particular purpose specified? Unless such an intention is to be found the doctrine of cy-près cannot be applied.]

The Court will be astute to find a general charitable intention, and here we submit there are distinct indications of it in this gift for an educational object: *In re Slevin* (5); Tyssen on Charities, p. 202. Further, this is for a charitable purpose practically indefinite in its duration: Tudor on Charities, p. 109; *Attorney-General* v. *Lawes* (6); *In re Blunt's Trusts.* (7)

(1) (1856) 24 Beav. 383.
(2) (1871) L. R. 6 Ch. 512, 515.
(3) [1923] 1 Ch. 243.
(4) [1918] 1 Ch. 437.
(5) [1891] 2 Ch. 236.
(6) (1849) 8 Hare, 32.
(7) [1904] 2 Ch. 767.

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Dighton Pollock for the Attorney-General. On the first point: This is an out and out gift to the University on certain conditions, which have been fulfilled, and this surplus can be applied for its own purposes: Tyssen on Charities, p. 141. Alternatively it can be applied cy-près: Tyssen, p. 202. In the event of both Universities failing to accept the gift it was left to the executors to carry out the general intention of the testator in the best way they could.

Clayton K.C. and *Vaisey* for the representatives of the residuary legatee. The University is not entitled to this surplus fund beneficially; it is given upon trust for an express charitable purpose and for no other. No paramount general charitable intention is expressed in this will, nor can any be implied. The fact that the 5000*l.* is given if accepted upon the conditions laid down negatives the idea that the testator had any general charitable intention. Besides, there are directions that the Dictionary may be sold, or extended, and these would be quite unnecessary if the University had a free discretion. All the testator wanted to do was to get his Dictionary published at one or other University. *Attorney-General* v. *Trinity College, Cambridge* (1), is distinguishable, as there the testator expressed a manifest intention to benefit the college, the estate being given "to their only proper use and behalf."

Where there is no general charitable intention expressed the doctrine of cy-près cannot be applied. The two classes of cases are clearly explained by Parker J. in *In re Wilson.* (2) Where a gift is given for a particular charitable purpose, but there is at the same time a paramount intention to give the property for a general charitable purpose, that will be carried out if the particular mode of application fails. The present case does not fall within that rule.

Gover K.C. in reply.

EVE J. By his will, dated September 30, 1876, the testator, who died on December 2, 1880, bequeathed 5000*l.* Consols,

(1) 24 Beav. 383. (2) [1913] 1 Ch. 314, 320.

free of all duties, to the University of Cambridge, to be transferred to them if accepted upon trust to be applied for the express purpose of carrying on to completion and publication his Dictionary of Anglicised Foreign Words and Phrases. He goes on to indicate the manner in which the fund is to be applied, but leaves to the University a wide discretion as to the mode of carrying out his wishes. He then directs that if Cambridge decline to accept the legacy, his trustees are to make the same offer to Oxford University, and if they decline, the trustees are to do their best in some other way to effectuate his wishes. The University of Cambridge accepted the bequest, the fund was transferred to them, and in due course, after a considerable expenditure of time and money, the book was published in 1892. The cost of the undertaking did not exhaust the fund, and a substantial surplus representing the balance of the fund and the income thereon remains. The question now arises, what is the proper destination of this surplus? On behalf of the University it is argued, in the first place, that the bequest is a conditional gift to the University involving, it might be, expenses sufficient to exhaust the fund, but involving this also, that if the condition has been fulfilled at a less cost then the University is beneficially entitled to any surplus that may remain, and in the alternative, that if the University was throughout a trustee of the fund for an express purpose, they are entitled, now that the purpose has been accomplished, to retain the surplus for the general purposes of the University, because the Court ought to construe the will as evidencing an intention to devote the whole fund to charitable purposes. If this alternative argument is accepted it is suggested that the surplus should be applied cy-près for some purpose akin to the express purpose indicated by the testator. The respondents ask the Court to reject both of these contentions. The University, they say, were obviously trustees; the argument that they were in the position of beneficiaries is refuted by the directions that if they were not willing to undertake the publication the fund was to go to the sister University, and if neither University were willing the trustees were to do their

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best to carry out the testator's wishes. According to the view put forward by the respondents these directions negative the idea of any intention on the part of the testator to make either University a beneficiary or indeed to accomplish anything except the attainment of his own desires to have his work completed and published. On similar grounds it is argued that the Court cannot construe this bequest as indicative of any general charitable intent, and accordingly there is no room for the application here of the cy-près doctrine.

In my opinion, it is impossible to hold that this is a conditional bequest to the University. The language of the bequest itself, the detailed directions as to the execution of the trust and the substitution of other trustees all go to negative any idea that the testator intended this to be a conditional legacy to Cambridge, and their cumulative effect is, I think, conclusive against the soundness of the first argument advanced on behalf of the University. In the next place can I say, apart from the paramount wish to have this fund applied in the publication of his work, that the testator has indicated any intention as to its application? In particular can I gather from his will any general intention that it should be applied for charitable purposes? It is easy to appreciate why he wished that one or other of the Universities should produce his work. One has only to look at it to see how important it was that the arrangement, printing and publishing of such a book should be under the direction and control of scholars. To put such a task in the hands of an ordinary publisher might be to court trouble and possible disaster. Moreover, for such a work the imprimatur of the University would be in itself a great advantage. There existed therefore very adequate grounds for making one or other of the Universities trustees for carrying out his wishes, and I cannot bring myself to hold that in making this bequest he had any general charitable intention or indeed any intention beyond the obvious one of getting one or other of the Universities to produce the work. In these circumstances I do not think there is any case for the application of the cy-près doctrine; there is a

resulting trust for the testator, and those claiming under him, of the surplus moneys, and they fall to be dealt with as part of his residuary estate. The trustees will retain their costs out of the fund in hand and the balance will go to the residuary legatees.

Solicitors : *Bloxam, Ellison & Co., for Francis & Co., Cambridge ; The Treasury Solicitor ; Field, Roscoe & Co., for Bubb & Co., Cheltenham.*

G. M.

In re MORANT.

Ex parte THE TRUSTEES.

[212 of 1921.]

Bankruptcy—Fraudulent Preference—Payment by Debtor in favour of "Creditor or person in trust for creditor"—Payment to Agent of Creditor—Personal Liability of Agent to repay—Personal Liability of Trustee for Creditor to repay—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 44.

A payment by a debtor to an agent who receives the money in the ordinary course of his employment for the use of a creditor is not a payment in favour of a "person in trust for any creditor," within the meaning of s. 44 of the Bankruptcy Act, 1914.

The effect of s. 44 of the Bankruptcy Act, 1914, is not to render the personal liability of an agent to repay a debt, payment of which he has received on behalf of his principal, greater than his liability in a case where money has been paid to him for the use of his principal in circumstances which entitle the person paying it to recover it back, even though it should turn out that, in fact, the payment constituted a fraudulent preference within the meaning of that section.

M. being indebted to G. and also to a company for the price of goods supplied, on January 14, 1921, paid to C. and B., agents of G. and the company and, to the knowledge of the debtor, authorized to receive the payment, the sum of 1500*l.* in settlement of the amounts respectively owing to G. and the company. The agents in the ordinary course of their employment received that sum for the use of their principals and paid over part thereof to G. and the balance to the company, such payment being made in good faith, in the belief that the payment was a good and valid payment, in ignorance of the impending bankruptcy of the debtor and long before any claim by the trustees in the bankruptcy. On February 11, 1921, the debtor committed an act of bankruptcy by assigning his property in favour of his creditors, and on March 12,

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1921, a receiving order was made against him on which he was adjudicated bankrupt.

Upon a motion by the trustees of the bankrupt for an order on C. and B. as agents (neither of their principals having been made respondents) to repay the 1500*l.*, on the ground that the payment was void against the trustees as a fraudulent preference:—

Held, first, that C. and B. received the money merely as agents of and for the use of the creditors in the ordinary course of their employment, and not as "persons in trust for any creditor" within the meaning of s. 44 of the Bankruptcy Act, 1914; and, secondly, that the circumstances under which the money was received and paid over precluded the applicants from recovering the money, even though it were proved that the payment, in fact, constituted a fraudulent preference, as to which the Court did not consider it to be necessary to decide.

Semble, that the personal liability of a person to whom payment has been made "in trust for any creditor" under s. 44 of the Bankruptcy Act, 1914, must depend upon the facts of each case; in particular, whether the trustee had acted in good faith and whether he still held the money or had paid it over to the creditor before having received notice that the payment constituted a fraudulent preference.

MOTION.

The facts, which were admitted, are taken from the judgment of the Court and are as follows: C. E. Morant, who traded under the style of C. E. Morant & Co. (hereinafter referred to as the bankrupt), was a silk merchant trading in London. In the course of his business he had been in the habit of buying goods from E. and P. Gavazzi, an Italian firm carrying on business at Milan (hereinafter called Gavazzi), through the respondents Messrs. Cave and Benoist, who had for many years acted as agents in London for Gavazzi. At Gavazzi's request, payment for goods supplied by them to the bankrupt were made to the respondents as such agents, The last delivery of goods from Gavazzi to the bankrupt took place on January 20, 1920. On January 24, 1920, a private limited company was incorporated under the name of William Cave & Son, Ld., and the respondents were appointed managers of that company by the articles of association. On the incorporation of William Cave & Son, Ld., that company took over from Gavazzi the benefit and obligations of all their contracts existing on December 17, 1919, for the sale and delivery of goods in the British Isles. Thereupon Gavazzi on or about February 17, 1920, sent a letter to the bankrupt

stating that the benefit and obligations of his contracts with that firm had been transferred to William Cave & Son, Ld., who had undertaken to deliver the balance of those contracts; that all payments in respect thereof should in future be made to William Cave & Son, Ld., and that payment for all goods invoiced prior to the date of the letter under the said contracts should, as theretofore, be made to the respondents. In pursuance of the arrangement so come to between Gavazzi and William Cave & Son, Ld., the respondents, in or about the month of March, 1920, sent to the bankrupt statements for all goods delivered to him by Gavazzi prior to December 17, 1919, in the name of Gavazzi with a notice indorsed thereon that cheques in payment of such invoices should be made payable to the respondents. The respondents at the same time sent statements for the goods delivered by Gavazzi to the bankrupt subsequently to December 17, 1919, in the name of William Cave & Son, Ld., to whom payment for those goods should have been made. On December 17, 1919, the bankrupt was indebted to Gavazzi in a considerable sum of money for goods delivered on and prior to that date. Between December 17, 1919, and January 20, 1920, the bankrupt became further indebted to Gavazzi in a substantial amount for goods delivered during this period. This latter indebtedness was transferred to William Cave & Son, Ld., under the arrangement above mentioned. In the latter part of 1919 and in 1920 the bankrupt was behindhand in his payments, and eventually on June 7, 1920, the following bills were drawn upon and accepted by the bankrupt—namely, in respect of his indebtedness to Gavazzi for goods delivered prior to December 17, 1919, two bills, one of which was for 1935*l.* 9*s.* at two months, and the other was for 2047*l.* 14*s.* 4*d.* at four months, both being drawn by the respondents as agents for Gavazzi in fact, although it did not so appear on the bills, and in respect of his indebtedness to William Cave & Son, Ld., for goods delivered subsequently to December 17, 1919, one bill for 2614*l.* 0*s.* 10*d.* at six months, drawn by the respondents as managers for and on behalf of William Cave & Son, Ld.

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The amounts of these bills included substantial sums in respect of interest which the respondents debited to the bankrupt in the hope of expediting his payments, on their own responsibility and without informing either of their principals that they had done so. The two months' bill for 1935*l.* 9*s.* was met at maturity in August, 1920. As regards the four months' bill for 2047*l.* 14*s.* 4*d.*, the bankrupt made a payment of 1000*l.* on account on October 6, 1920, and, in settlement of the balance, accepted a fresh bill on October 7, 1920, for 1054*l.* 7*s.* 6*d.* at one month drawn upon him by the respondents as agents for Gavazzi. On November 6, 1920, the bankrupt paid a sum of 250*l.* on account of the bill for 1054*l.* 7*s.* 6*d.* The balance of this bill was not met on November 10 when it became due, but on December 4, 1920, the bankrupt paid a further sum of 250*l.* in respect thereof, leaving a balance of 554*l.* 7*s.* 6*d.* due on that bill. The bill for 2614*l.* 0*s.* 10*d.* fell due on December 10, 1920, and was not met.

Accordingly on January 14, 1921, there was due from the bankrupt in respect of goods supplied by Gavazzi and interest a total sum of 3168*l.* 8*s.* 4*d.*—namely, 554*l.* 7*s.* 6*d.* balance of the bill for 1054*l.* 7*s.* 6*d.* due to Gavazzi, and 2614*l.* 0*s.* 10*d.* the whole of the bill due to William Cave & Son, Ld. On January 14, 1921, the bankrupt paid to the respondents the sum of 1500*l.* in full settlement of the amounts due to Gavazzi and William Cave & Son, Ld. The respondents accepted this sum in good faith and in ignorance of the impending bankruptcy of the bankrupt, although they knew that the bankrupt was in difficulties. The balance of 1668*l.* 8*s.* 4*d.* which the respondents agreed to write off, approximately equalled the amount of interest which they had charged as before mentioned. The respondents, on receiving the cheque for the 1500*l.*, paid it into their own banking account, and on the same day drew a cheque for 945*l.* 12*s.* 6*d.* in favour of William Cave & Son, Ld., and paid such cheque into that company's account. They also credited their account with Gavazzi with 554*l.* 7*s.* 6*d.*, the balance of the 1500*l.*, and advised Gavazzi of this credit, which advice was duly

acknowledged by Gavazzi. Since that date the respondents dealt to their detriment with Gavazzi in the belief that the payment of the 1500*l.* was a good and valid payment. On February 11, 1921, the bankrupt executed a deed of assignment for the benefit of his creditors, and on February 19, 1921, the petition upon which he was eventually, on March 12, 1921, adjudicated bankrupt was presented, the act of bankruptcy relied upon being the execution of the deed of assignment. The first claim for the payment of the 1500*l.* by the trustees against the respondents was made on February 22, 1923.

This was a motion by the trustees of the bankrupt asking for a declaration that the payment of the 1500*l.* by the bankrupt to the respondents, Messrs. Cave and Benoist, was void as against the trustees as a fraudulent preference ; and for an order on the respondents to pay that sum to the applicants.

It was, in the first place, contended on behalf of the trustees in bankruptcy that the payment constituted a fraudulent preference, and that the payment being therefore void under s. 44 of the Bankruptcy Act, 1914, the money was recoverable from the respondents. The argument in support of that contention is not material to this report, because, in the judgment of the Court, apart altogether from that question and even assuming that the payment did constitute a fraudulent preference, the only question to be decided was whether money paid to an agent for the use of a creditor could be lawfully recovered from the agent, merely on proof that the payment constituted a fraudulent preference in fact.

Comyns Carr for the trustees. The payment to the respondents was, within the terms of s. 44 of the Bankruptcy Act, 1914, a payment in favour of "any person in trust for any creditor," and, as such a payment is by that section to be deemed fraudulent and void, the money can be recovered from the respondents. At the moment when the payment was made to them they became trustees of the money for their principals. What they did with the

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money after their receipt of it, it is irrelevant to consider. Only the person to whom the payment is made can be proceeded against for the recovery of the money. When once the mere fact that the payment constituted a fraudulent preference is established, the money in the hands of the respondents was, by the doctrine of relation back, the property of the trustees: *In re Gunsbourg.* (1)

Tindale Davis for the respondents. First, the motion is misconceived. The respondents are not persons liable to refund the money. They were neither creditors nor persons in trust for creditors: they were mere agents for disclosed principals; and agents do not come within the purview of the section. They parted with the money in good faith, and cannot be made liable to refund it. The only persons liable to be proceeded against are the creditors. The principle of *In re Gunsbourg* (1) does not apply to money, only to chattels, as money cannot be the subject of conversion.

Cur. adv. vult.

Nov. 5. P. O. LAWRENCE J. The object of this motion is to recover from the respondents, Messrs. Cave and Benoist, a sum of 1500*l.* paid to them by the bankrupt on January 14, 1921, on the ground that such payment was a fraudulent preference.

The respondents deny liability, first, on the ground that the 1500*l.* was paid to them merely as agents for the use of two of the bankrupt's creditors, in whose favour they have dealt with the money in good faith before any claim by the applicants, and, secondly, on the ground that the applicants have failed to prove that the payment was, in fact, a fraudulent preference. The question of the liability of the respondents is one which goes to the root of this motion, as the applicants have elected to proceed against Messrs. Cave and Benoist as sole respondents, after I had expressed to counsel my willingness to entertain an application for an adjournment of the motion for the purpose of giving the applicants

(1) [1920] 2 K. B. 426, 437.

an opportunity of considering the advisability or practicability of adding or substituting the two creditors, or either of them, as respondents. Counsel have not been able to refer me to any case which deals with the liability of an agent who, on behalf of his principal, has received payment of a debt, which payment turns out to have been a fraudulent preference, nor has my own research resulted in the discovery of any such case. Although s. 44 of the Bankruptcy Act, 1914, does not expressly provide for the recovery of a payment constituting a fraudulent preference, the enactment that such a payment is to be deemed fraudulent and void as against the trustee in bankruptcy necessarily implies that the trustee is entitled to recover the amount paid. In the majority of cases, no doubt, payment of a debt is made directly to the creditor; and, if such payment is a fraudulent preference, it is recoverable from him. There must, however, be many cases where a debt is paid to an agent for the creditor, and it strikes one as somewhat strange that no reported case is to be found where such a payment has been attacked as a fraudulent preference and has been sought to be recovered from the agent. On principle, I do not see any reason why the personal liability of an agent in such a case should be any greater than in a case where money is paid to an agent for the use of his principal under circumstances which entitle the person paying it to recover it back. No doubt the trustee in bankruptcy in claiming repayment of money under s. 44 is asserting a higher right than the bankrupt would have had, if he had remained solvent; but that fact, in my opinion, does not involve the proposition that the trustee can recover the money from an agent where such agent would not have been liable, had the person paying it been entitled to recover it back. In my opinion the Legislature by enacting that a payment in favour of a creditor with a view of preferring him is to be deemed fraudulent and void as against the trustee in bankruptcy did not intend to place and has not placed agents under any greater liability than the liability which they would be under in cases where they had received money which had been obtained by duress or fraud. If that be the

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true principle, it seems to me to follow that where an agent, on behalf of a creditor, receives from a debtor payment of a debt under such circumstances as to constitute a fraudulent preference, and the agent knows that the debtor is insolvent and is making the payment with a view to preferring the creditor, then the money can be recovered from the agent on the ground that the agent was party or privy to the fraudulent preference; but where an agent, in the ordinary course of his employment, receives payment of a debt for the use of his principal, and in good faith pays the money over to, or otherwise deals to his detriment with, his principal in the belief that the payment is a good and valid payment, then the money cannot be recovered from the agent, although it turns out that, in fact, the payment was a fraudulent preference; in such a case the money must be recovered from the principal.

Mr. Comyns Carr, however, relies on the express enactment in s. 44, sub-s. 1, that a payment in favour of any person in trust for any creditor is to be deemed fraudulent and void as against the trustee in bankruptcy, his contention being that the respondents were trustees for their principals, and that, as the payment to them in that character is to be deemed fraudulent and void, the money can be recovered from them. In my opinion there are two answers to this contention. In the first place, I do not think that the payment was made to the respondents in trust for the two creditors within the meaning of s. 44. I will deal with the exact position occupied by the respondents hereafter, but for the present purpose it is enough for me to say that, on the evidence, I have come to the conclusion that the respondents were merely the agents of the creditors, and that the payment was made by the bankrupt to them solely in that capacity. It is true that a confidential agent may often be in the same position and under the same duties and liabilities as if he were a trustee for his principal, but I do not think that the Legislature intended the expression "any person in trust for any creditor" to apply to the ordinary case of the payment to an agent for the use of his principal. The payment of a

debt to an authorized agent for the use of the creditor operates in law as a payment to the creditor, and such a payment is, in my judgment, covered by the words in s. 44, sub-s. 1: "every payment made . . . . in favour of any creditor." What I think is more likely to have been in the contemplation of the Legislature, when adding the expression "any person in trust for any creditor," is, that a payment might be made to a trustee (either created ad hoc or existing under some instrument) in such circumstances as would support the contention that no payment had been made to the creditor himself. In my opinion, it was in order to bring such a payment within the scope of the section that the expression in question was inserted. In the next place, it does not, in my opinion, necessarily follow that, because a payment to a trustee for a creditor is to be deemed fraudulent and void, the trustee to whom the payment was made is personally liable to pay the money to the trustee in bankruptcy. I think that the liability of the trustee would depend upon the facts of each case, and in determining upon his liability the Court would take into consideration (inter alia) whether he had acted in good faith and whether he still held the money or had paid it over to his cestui que trust before having received notice that the payment was fraudulent and void.

On both these grounds, therefore, I am of opinion that the words relied upon by Mr. Comyns Carr do not have the wide effect contended for by him. Now the admitted facts, so far as I consider them to be material for the purpose of determining whether the 1500*l.* can be recovered from the respondents, are shortly as follows: [His Lordship then stated the facts as above set out, and continued:]

The first claim for the payment of the 1500*l.* by the trustees against the respondents was made on February 22, 1923, and the present motion was launched on July 30, 1923, long after the respondents had in good faith dealt with the money in such a way as to make it inequitable to compel them to refund it.

In these circumstances, I have come to the conclusion that the respondents are not liable, even if it should turn

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out that the payment of the 1500*l.* was a fraudulent preference. In the result I hold that the respondents are entitled to succeed on their first ground of defence, and their second ground of defence does not call for decision. That being so, it would not be right that I should express any opinion upon the question whether the applicants have discharged the burden cast upon them of proving that the payment of the 1500*l.* was in fact a fraudulent preference. The motion will be dismissed with costs.

Solicitors: *G. L. Lepper; E. F. Turner & Sons.*

H. C. H.

TOMLIN J. 1923 *Oct.* 16.

In re FALKINER.

MEAD *v.* SMITH.

[1923. F. 647.]

Will—Bequest—Request to Legatees to apply in Accordance with Memorandum—Declaration that Memorandum not to "create any trust or legal obligation"—Memorandum handed to Legatees—Agreement by Legatees with Knowledge of Provisions of Will to carry out expressed Wishes—No secret Trust.

By her will, dated April 22, 1922, a testatrix devised and bequeathed her real and personal estate to two persons upon trust for sale and conversion and investment of the net proceeds as therein mentioned. She then bequeathed to the two persons by name "absolutely as joint tenants one half of the residuary trust moneys, with the request that they will dispose of the same in accordance with any memorandum or paper signed by me and deposited with this my will or left amongst my papers at my death." There was a similar gift of the other half of the residuary trust moneys, subject to a life interest. She then declared that any such memorandum or paper should not have any testamentary character, "and the above expression of my wishes as to the disposal of the said sums shall not create any trust or legal obligation, even if the same shall be communicated to my trustees in my lifetime."

The two persons were the partners in the firm of solicitors which prepared her will, and an earlier will dated August 9, 1921, which contained the same bequests and declaration. Before the date of the first will the testatrix sent to one of the partners a list containing the names of those she wished to benefit, and in preparing her first will he did his

utmost to induce her to allow the names of beneficiaries to be inserted in the ordinary way, but she refused. On October 18, 1921, the testatrix sent him revised lists of the persons and institutions she wished to benefit, and requested him to destroy the earlier list, and he replied next day, "I have your letter of the 18th inst., with the enclosures, and quite understand your instructions." Subsequently she wrote letters making slight alterations in the lists, which he similarly acknowledged :—

Held, that the true inference was, seeing that the partners had full knowledge of the contents of the testatrix's will, that they only agreed to give effect to the testatrix's wishes in accordance with the scheme of the will, including the provision that there was to be no trust or legal obligation, and accordingly that they took the property bequeathed to them absolutely for their own benefit.

In re Spencer's Will (1887) 57 L. T. 519 distinguished.

ADJOURNED SUMMONS.

By her will dated April 22, 1922, Marie ffrench Falkiner, after appointing Henry John Mead and Henry Gifford Mead to be her executors and trustees, devised and bequeathed all her real and personal estate to her trustees upon trust to sell, call in, and convert into money the same, and with and out of the moneys produced by such sale, calling in, and conversion to pay her funeral and testamentary expenses and debts and to invest the residue of the said moneys, or so much thereof as should not be immediately required to satisfy the trusts thereinafter declared as therein mentioned. Then followed clauses 5 to 8 of her will, which were as follows :—

"5. I bequeath unto the said Henry John Mead and Henry Gifford Mead absolutely as joint tenants one half of the residuary trust moneys with the request that they will dispose of the same in accordance with any memorandum or paper signed by me and deposited with this my will or left among my papers at my death.

"6. My trustees shall stand possessed of the remaining half of the residuary trust moneys and the investments for the time being representing the same In trust to pay the income thereof to Humphrey Donnell O'Sullivan of Burton-on-Trent Physician during his life.

"7. Subject to clause 6 hereof I bequeath unto the said Henry John Mead and Henry Gifford Mead absolutely as joint tenants the remaining half of the residuary trust moneys

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with the request that they will dispose of the same in accordance with any memorandum or paper signed by me and deposited with this my will or left among my papers at my death.

" 8. Any such memorandum or paper referred to in clauses 5 and 7 hereof shall not be deemed to form part of my will or to have any testamentary character and the above expression of my wishes as to the disposal of the said sums shall not create any trust or legal obligation even if the same shall be communicated to my trustees in my lifetime."

The testatrix had previously made a will dated August 9, 1921, which differed from her second will in only two respects. First, in the earlier will Dr. O'Sullivan was also appointed an executor and trustee; and secondly, the earlier will contained no provision such as there was in the later will (clause 11) appointing the Westminster Bank a custodian trustee.

Both wills were prepared by Messrs. Mead & Sons, a firm of solicitors consisting of Henry John Mead and Henry Gifford Mead, his son. It appeared from an affidavit of Henry Gifford Mead that shortly before August 9, 1921, the testatrix instructed him to prepare her will of that date. Before preparing the will he strongly urged the testatrix to state in her will the names of the various beneficiaries whom she desired to benefit as set out in a list sent by her to him dated May 24, 1921, but she refused to accept this advice, and stated that unless the will was drawn in the form she wished she would employ other solicitors. In these circumstances he prepared the will, but upon condition that the testatrix executed it in the presence of an independent solicitor who should go through it with her and satisfy himself that it carried out her wishes. This was in fact done. Subsequently the testatrix wrote a letter to him dated October 18, 1921, enclosing revised lists dated October 12, 1921, dealing with the distribution of her estate at her death, and she instructed him to destroy the earlier list. The first of the new lists contained the names of a number of persons and institutions with sums of money set opposite the names amounting to 7670*l.* and was headed

"Gifts and Legacies at my death." Another list consisted entirely of gifts of pictures and other chattels. The remaining list was headed "Second List for Messrs. Mead and Sons after death of my other executor," and it also contained the names of a number of persons and institutions with sums set opposite the names of all except the last amounting to 2360*l*. Against the last name appeared the word "residue."

H. G. Mead replied to the testatrix's letter by a letter dated October 19, 1921, in which he said: "I have your letter of the 18th inst. with the enclosures and quite understand your instructions." On January 23, 1922, the testatrix wrote to H. G. Mead a letter containing the following passage: "I also want to say that should I die in the flat I should like Hearne, my maid, to have my clothes and trunks to dispose of and to stay on in the flat on board wages for a month or so to go through things. Please note that I want Miss Agnes M. Smyth to be put in the list for 25*l*." On January 25, 1922, H. G. Mead replied, "I have noted your wishes and will ensure that they are carried out."

In April, 1922, the testatrix instructed H. G. Mead to prepare a new will for her, and on April 21, 1922, the testatrix had an interview with H. G. Mead, and he made the following note of what took place: "Mrs. ffrench Falkiner has to-day instructed me that she wishes the furniture, linen, plate and pictures sold and the proceeds treated as part of general estate, her books only going to M. C. Maycock except for pictures specifically mentioned. Mrs. Falkiner has arranged with Albert Smith that he shall look after his blind brother Harry his wife and children out of the money he is to receive. We are to consider the purchase of a business for Albert Smith so that if he thinks fit he can take his brother Ernest as junior partner. Mrs. Falkiner wishes to revoke the appointment of Dr. O'Sullivan as executor and trustee as having regard to his increasing responsibility and second family she does not want him to be troubled with her affairs. . . . ." The testatrix signed her new will on the following day.

On May 3, 1922, the testatrix wrote a letter to H. G. Mead requesting him to put the name of Miss M. A. Atkinson "on

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my first list for distribution after my death for the sum of 20*l.*" The testatrix died on June 4, 1922.

In April, 1923, H. J. Mead and H. G. Mead took out this summons to have it determined whether according to the true construction of the testatrix's will and in the events which had happened the moiety of the residuary estate of the testatrix bequeathed by clause 5 of her will with the income thereof as from her death ought to be held by them: (*a*) for their own benefit free from any trust, or (*b*) subject to a trust for the application thereof for the benefit of the persons named in the lists dated October 12, 1921, as modified by subsequent letters of the testatrix and in the proportions in the lists and letters mentioned, or (*c*) subject to a trust in favour of the next of kin of the testatrix at the time of her death,

Lyttelton Chubb for the plaintiffs. The general principle is that "where property is given by will to A. in terms which imply that he is to take it for his own benefit, but the testator informs A. of his intention that A. is to hold the property upon trust, the terms of which he communicates to him, evidence of the trust is admissible, and it will, if legal, be enforced": Jarman on Wills, 6th ed., vol. i., p. 910. This case however falls within the exception mentioned on the next page of Jarman on Wills: "The wishes of the testator may be expressed in such a way as to shew that he did not intend to create a trust, as where he gives the devisee or legatee an absolute discretion in the disposition of the property": *In re Pitt-Rivers* (1); *McCormick* v. *Grogan*. (2) Here the testatrix has declared by her will that no trust or legal obligation is imposed, and the donees therefore take the property for their own benefit. They do not intend to appropriate, but wish to have a discretion as to its disposition.

W. G. Hart for a beneficiary mentioned in the revised lists. The facts here disclose a trust in favour of the persons specified in the lists. H. G. Mead said in the letter of October 19, 1921, and January 25, 1922, that he would carry out the testatrix's instructions, and the donees must hold

(1) [1902] 1 Ch. 403, 409. (2) (1869) L. R. 4 H. L. 82.

the property on trust to do so. There was a clear promise to carry out the testatrix's wishes and a trust is therefore imposed: compare Key and Elphinstone's Precedents in Conveyancing, 11th ed., vol. ii., p. 840, and *In re Gardom.* (1) The fact that the testatrix has declared in her will that no trust is to be created does not alter this: *In re Spencer's Will.* (2)

[TOMLIN J. Is not the real question what inference is to be drawn from the facts, whether the promise to give effect to the testatrix's wishes was an absolute promise or a promise subject to the known terms of the will ?]

There are circumstances outside the will which create a trust, and the declaration of the testatrix in her will cannot affect that.

Sanger for another beneficiary. When a person prevails upon a testator to make a will in his favour on the understanding that the gift will be applied in a certain manner, he is bound by the trust so created: see Maitland's Lectures on Equity, p. 61. He cannot accept on the footing that there is not to be a trust: *In re Spencer's Will.* (2)

Shebbeare for the next of kin of the testatrix. On the construction of the will of the testatrix there is a trust indicated the objects of which do not appear. Under the Executors Act, 1830, it is for executors to show affirmatively that they do not hold their testator's property upon trust. The reference to "residuary trust moneys" shows that the trustees were to hold the same as trustees.

Again they are not trustees for the persons and institutions contained in the lists handed to them in view of the provision in the will that there is to be no "trust or legal obligation to fulfil her wishes." They are therefore trustees for the next of kin: Hawkins on Wills, 2nd ed., p. 364; *Ellcock* v. *Mapp* (3); *In re Boyes.* (4)

Lyttelton Chubb in reply.

TOMLIN J. In this case the question is whether the shares of the residuary estate left to Henry John Mead and Henry

(1) [1914] 1 Ch. 662.
(2) 57 L. T. 519.
(3) (1851) 3 H. L. C. 492.
(4) (1884) 26 Ch. D. 531.

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Gifford Mead are held by them for their own benefit or whether, either by virtue of the will or by virtue of something outside the will, they are held by them as trustees, and if so for whose benefit. [His Lordship then stated the facts and continued :] The Messrs. Mead have stated by their counsel at the Bar that they intend to give effect to the wishes of the testatrix as expressed by the documents of October 12, 1921, but it makes some difference whether they are under a trust to do so or are left with a free discretion.

The first question is whether they are absolute owners of what is expressed to be given them by the will. If not, then the further question will arise whether they are trustees for the persons and institutions set out in the lists of October 12, 1921, or whether they are trustees of a fund of which the beneficial interest is undisposed of, so that the persons beneficially entitled are the testatrix's next of kin. I think the question whether, if there is not a trust created outside the will in favour of the persons named in the lists, the Messrs. Mead are trustees for the next of kin must depend on the construction of the will itself ; because if there was no bargain outside the will imposing a fiduciary relationship, then that relationship can only exist by virtue of the terms of the will itself. Looking at the will, I do not think that any fiduciary relationship is created. By the fifth clause of the will the testatrix bequeathed to them absolutely as joint tenants a moiety of the residuary trust moneys, with the request that they would dispose of the same in accordance with any memorandum or paper signed by her and deposited with her will or among her papers ; and the position is similar with regard to the remaining moiety subject to a life interest given to Dr. O'Sullivan. Then by clause 8 the testatrix provides : " Any such memorandum or paper referred to in clauses 5 and 7 hereof shall not be deemed to form part of my will or to have any testamentary character and the above expression of my wishes as to the disposal of the said sums shall not create any trust or legal obligation even if the same shall be communicated to my trustees in my lifetime." I think on the true construction of the will the Messrs. Mead take

these interests absolutely, and that, assuming there are no trusts created outside the will, they cannot be said to be trustees for the next of kin.

The remaining question is whether they are trustees by reason of some bargain outside the will. I do not think the principle is in doubt that if a gift made absolutely by will is induced by a representation that the donee will apply the same in some special manner indicated by the testator, the Court will impose a trust on the donee binding on his conscience and will give effect to that trust. But the question must always be what the donee has in fact agreed to do; and it must be borne in mind in this case that whatever H. G. Mead agreed on behalf of his father and himself to do he did it with full knowledge of all the relevant documents. He knew that the testatrix objected to her will taking a form which showed the persons intended to be benefited. He knew also that she had expressed her intention in the will that no trust or legal obligation should be imposed; and the question is whether the true inference to be drawn is that in agreeing to carry out her wishes he was giving an absolute assent so as to create a trust or a qualified assent subject to the terms and conditions contained in her will, including the condition that he and his father would remain absolute owners of the property bequeathed to them, though under a moral obligation to carry out her wishes.

It has been suggested to me that *In re Spencer's Will* (1) precludes me from coming to any conclusion other than that there was an absolute agreement to give effect to the testatrix's wishes so as to create a trust. I do not think it has that effect. That case only decided what evidence was admissible on a question of this sort. It is quite true that the will contained language suggesting that the testator did not intend to create a trust. It contained this phrase "relying but not by way of trust upon their applying the said sum in or towards the object or objects privately communicated to them." But what the effect of those words was did not fall for decision. Further there is nothing in that case to show that the persons

(1) 57 L. T. 519.

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who undertook to carry out the wishes of the testator ever knew of the form or contents of the will at all or were in a position differing from that of a man to whom a testator says: "I have left my money to you and I will not revoke my will if you will undertake to apply the money as I wish." It is quite plain that the clause in the will could not diminish the obligation of a donee who had undertaken to carry out the testator's wishes, unless the terms of the will were known to him and were intended to be part of the arrangement. On the other hand, if it were intended to be part of the bargain which the parties made, it would become operative not by virtue of its being a term in the will but by virtue of its being a term of the bargain.

The question therefore is whether I am to draw the inference that the bargain entered into was a bargain simpliciter to give effect to the testatrix's wishes or a bargain to do so in accordance with the scheme of her will, including the clause declaring that there was to be no trust or legal obligation. I have come to the conclusion that I ought to hold that there was never any agreement between the donees and the testatrix which was absolute in such a sense as to impose a legal obligation. Therefore I answer the summons by saying that the donees take the fund for their own benefit.

Solicitors: *Mead & Sons.*

H. C. G.

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1923
Oct. 25, 26.

[1922. C. 4973.]

Vendor and Purchaser—Deposit—Conditional Agreement—"Subject to a proper contract"—Proper Contract tendered by Vendor—Refusal of Purchasers to proceed—No firm Contract—Recovery of Deposit.

By a document of July 10, 1922, the purchasers agreed to purchase certain freehold land and a nursery from the vendor "subject to a proper contract to be prepared by the vendor's solicitors" and acknowledged having paid 240*l.* "as deposit and in part payment of the said purchase money." Completion was fixed for November 2. The purchasers signed the document and the vendor added and signed a receipt for the deposit confirming the sale.

A proper contract was subsequently prepared by the vendor's solicitors, approved by the purchasers' solicitor, executed by the vendor, and tendered to the purchasers for execution. The purchasers however refused to sign it, declined to proceed with the transaction, and claimed the return of the deposit:—

Held, by the Court of Appeal, that the document of July 10, 1922, was only conditional, and did not constitute a firm contract, and (reversing the decision of Astbury J.) that the purchasers were in the circumstances entitled to recover the deposit.

Hatzfeldt-Wildenburg v. *Alexander* [1912] 1 Ch. 284; *Rossdale* v. *Denny* [1921] 1 Ch. 57; and *Coope* v. *Ridout* [1921] 1 Ch. 291 followed.

Moeser v. *Wisker* (1871) L. R. 6 C. P. 120 questioned.

Decision of Astbury J. [1923] 1 Ch. 576 reversed.

APPEAL from the decision of Astbury J. (1)

By a document signed on July 10, 1922, the plaintiff purchasers agreed to purchase from the defendant vendor for the sum of 4800*l.* "subject to a proper contract to be prepared by the vendor's solicitors" all his freehold land and nursery at Cadmore Lane, Cheshunt, Herts, together with the fifteen glasshouses and all other buildings, erections, engine and fixed plant thereon including all rolling stock and utensils connected with the business "a schedule of which has been prepared and signed by both parties"; and acknowledged having paid that day, July 10, 1922, the sum of 240*l.* "as deposit and in part payment of the said purchase money." Completion was fixed for November 2, 1922, when vacant possession was to be given. The vendor was to leave at least

(1) [1923] 1 Ch. 576.

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one man in charge of the nursery up to the said day of completion.

The purchasers signed this document and the vendor added and signed the following confirmatory receipt: "I hereby confirm the above sale and acknowledge receipt of deposit of 240*l.* above mentioned." A footnote stated: "Balance purchase money 4560*l.*"

On the same day the vendor signed and gave the purchasers the following additional receipt: "Received of [the purchasers] July 10, 1922, the sum of 240*l.* being deposit and part payment of the sum of 4800*l.* on sale of my nursery Cadmore Lane, Cheshunt, as per agreement entered into this day July 10, 1922. Balance of purchase money being 4560*l.*"

A schedule of trade utensils was signed on the same day. It was headed "Schedule of utensils in trade at [the vendor's] nursery Cadmore Lane Cheshunt Herts under agreement for sale to [the purchasers] dated this day July 10, 1922." Then followed three pages containing a list of the utensils purchased with the following note at the foot signed by the purchasers and vendor: "We agree this to be the schedule referred to in the sale agreement between us dated July 10, 1922."

On August 1, 1922, the vendor's solicitors sent a proper formal contract for approval, and after certain alterations it was finally approved by the purchasers' solicitor on September 23, with an intimation that he was engrossing his part. The vendor's engrossment was signed on September 28, but the purchasers did not sign their engrossment, and on October 12 their solicitor wrote: "I regret to say that my clients do not feel disposed to proceed with the negotiations in this matter. I should therefore be glad to receive cheque for the deposit."

The vendor's solicitors took the view that there was a binding contract and did not return the deposit.

On November 14, 1922, the purchasers commenced this action for a declaration that there was no binding contract and for return of the deposit, submitting that the agreement

of July 10, 1921, was conditional on a proper contract being prepared and signed by both parties, which had not been done.

The vendor did not admit that the agreement was conditional. He relied on the proper contract approved by both sets of solicitors, which he had always been and was still willing to complete and had pressed the purchasers to complete. He was also willing to waive the condition as to the preparation of a proper contract, which he said was only inserted for his benefit, and to complete the contract of July 10, 1922, as it stood. He did not counterclaim for specific performance.

Astbury J. held, assuming (without deciding) that the document of July 10, 1922, was only conditional, and did not constitute a firm contract, that the purchasers were not in the circumstances entitled to recover the deposit, which was a guarantee that they would proceed with the transaction on the vendor tendering a proper contract.

The purchasers appealed. The appeal was heard on October 25 and 26, 1923.

Luxmoore K.C. and *Lionel Cohen* for the appellants. The first question to be determined is whether the document of July 10, 1922, constituted a binding contract between the parties. That is a question of construction, and depends on the meaning to be attached to the words " subject to a proper contract to be prepared by the vendor's solicitors " in the document. The test proposed by Parker J. in *Hatzfeldt-Wildenburg* v. *Alexander* (1) is the correct one. Here it is submitted the contract was conditional on a formal contract being prepared and executed by the parties: *Rossdale* v. *Denny* (2); *Winn* v. *Bull* (3); *Coope* v. *Ridout.* (4) Even if the document of July 10, 1922, is to be regarded as a contract to enter into a contract, that would have no legal effect: see per Warrington L.J. in *Coope* v. *Ridout.* (5)

(1) [1912] 1 Ch. 284, 289.
(2) [1921] 1 Ch. 57, 63.
(3) (1877) 7 Ch. D. 29, 30.
(4) [1921] 1 Ch. 291.
(5) Ibid. 297.

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[SARGANT L.J. The phrase "contract to enter into a contract" is not correct. It should be "contract to enter into an indeterminate contract." The Court will enforce a contract to enter into a determinate contract, as, for example, to renew a lease.]

Coope v. *Ridout* (1) was a case very similar to the present. There the offer contained the words "subject to title and contract," and it was held that even assuming all the terms had been settled one by one and embodied in a draft, the condition contained in the offer required that a written agreement made inter partes should be formally entered into, and that in the absence of such a document there was no enforceable contract.

The second point is whether, assuming there is no concluded contract, the purchasers can recover back the deposit. The deposit was paid for a definite purpose. It was paid in contemplation of a contract being entered into, and unless a contract has been entered into the vendor is not entitled to retain the deposit.

The present case was decided by Astbury J. on a misapprehension of the effect of the decision in *Moeser* v. *Wisker*. (2) That case, however, affords no countenance to the proposition that where there is no contract the Court can go into the question whether the vendor or purchaser has acted reasonably.

Thomas v. *Brown* (3) is distinguishable on the ground that in that case there was a binding contract.

Since the decision of the present case in the Court below the same question has arisen in *Wright* v. *Pocklington* (4), in which Eve J. refused to follow the decision of Astbury J.

Micklem K.C. and *W. F. Webster* for the respondent. First, there was a binding contract. The payment of a deposit and the fact that the additional receipt and the schedule of chattels refer to the "agreement" or the "agreement for sale" show that the parties thought there was a binding agreement. It was not a "conditional deposit" as in

(1) [1921] 1 Ch. 291.
(2) L. R. 6 C. P. 120.
(3) (1876) 1 Q. B. D. 714.
(4) Unreported July 12, 1923.

Lloyd v. *Nowell* (1), but was paid absolutely as on a contract. These facts distinguish this case from the cases referred to by the appellants.

Secondly. Assuming there was no binding contract, still the deposit cannot be recovered. A deposit is an earnest and corresponds to the arra of Roman law: Inst. Lib. III., tit. 23 pr.: Moyle's Contract of Sale in the Civil Law, p. 43. The nature of a deposit is explained by Fry L.J. in *Howe* v. *Smith*. (2) It is primarily a security that the purchaser will carry out the contract or, as Lord Macnaghten said in *Soper* v. *Arnold* (3), that he "means business."

[WARRINGTON L.J. There was a binding contract in that case.]

Yes, but the principle is the same where there is only a contract to enter into a contract. In such a case the deposit is a security that the purchaser will sign a proper contract if it is tendered. Although a contract to enter into a contract has itself no legal effect, this does not prevent the Court from holding the deposit to be forfeited if the Court is satisfied that it was paid to secure the purchaser's agreement to sign a proper contract and that the purchaser has unreasonably refused to sign. The propriety of the draft contract tendered here is not in dispute. In some cases it might be difficult to decide whether the contract which the purchaser refuses to sign is a proper contract. But the Court will decide such a dispute: see *Moeser* v. *Wisker* (4), where it was held that the contract tendered by the vendor was unreasonable and the purchaser was entitled to recover his deposit. If the purchaser could have recovered his deposit in any case whether the contract tendered by the vendor was reasonable or not, it was unnecessary to go into the question whether the vendor had tendered a reasonable contract.

[WARRINGTON L.J. *Moeser* v. *Wisker* (4) was decided on an ex parte application.

POLLOCK M.R. The Court there thought they could take a short cut.]

(1) [1895] 2 Ch. 744.
(2) (1884) 27 Ch. D. 89, 101.
(3) (1889) 14 App. Cas. 429, 435.
(4) L. R. 6 C. P. 120.

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Thomas v. *Brown* (1) also supports the vendor's contention. Then it is said that the deposit here was intended only as a conditional deposit. If that had been the intention it could easily have been expressed by using the words "conditional deposit," as in *Lloyd* v. *Nowell.* (2) Here the deposit was mentioned in three documents, and nowhere was it called "conditional."

Lastly this is an action for money had and received to the purchasers' use. The purchasers must show either that the money was paid under a mistake of fact (which is not suggested), or that there is a failure of consideration. There has been no failure of consideration here; the vendor has always been ready and willing to complete, and offered to do so in his defence. It is not a sufficient ground in such an action as this to allege a failure of consideration brought about by the purchasers' own conduct. Notwithstanding the recent criticisms on Lord Mansfield's description in *Moses* v. *Macferlan* (3) of the cases in which an action for money had and received will lie, it is still true that an unfair claim will not succeed. The plaintiff must show that it is unconscientious of the defendant to retain the money: Hamilton L.J. in *Baylis* v. *Bishop of London.* (4) The vendor here can conscientiously keep the money, as the purchasers have refused to sign a proper contract.

Luxmoore K.C. in reply was called upon on the question how long the vendor could keep the deposit, and as to *Baylis* v. *Bishop of London.* (4)

It is submitted that a purchaser is entitled to recover back his deposit as soon as it is certain that there will be no contract. The Court cannot go into the question how long the parties should go on negotiating.

In *Baylis* v. *Bishop of London* (4) Hamilton L.J. puts the onus on the defendant of proving that it is conscientious for him to keep the money.

POLLOCK M.R. The plaintiffs in this action, who were purchasers, claimed a return of a sum of 240*l.* which they

(1) 1 Q. B. D. 714.
(2) [1895] 2 Ch. 744.
(3) (1760) 2 Burr. 1005, 1012.
(4) [1913] 1 Ch. 127, 140.

paid to the defendant on the signing of a document dated July 10, 1922, but the defendant contended that the document was a binding contract for the purchase and sale of freehold land and a nursery at Cheshunt, Hertford, belonging to the defendant, that the deposit was a deposit or guarantee that the plaintiffs would complete the purchase, and that as, without assigning any reason, the plaintiffs refused to complete, the deposit was forfeited and he was entitled to retain it. It has been said that this case is one of general interest and application in other cases where the words of a document are very similar, but for my own part I do not think that this case can be of wide application, as the decision depends on this particular document and the particular circumstances under which it was signed. I think the point is really a narrow one, and is covered by reported decisions to which I shall refer. [His Lordship stated the facts and continued:] The negotiations for a proper contract proceeded, and later the purchasers broke off negotiations for reasons good, bad, or indifferent, and thereupon claimed to be repaid the 240*l*.

The question we have to consider is whether Astbury J. was right in holding that the plaintiffs were not entitled to be repaid the 240*l*. In the first place it is necessary for this Court to make up its mind as to the effect of the document of July 10, 1922. Is it or is it not a concluded agreement, so that the parties are bound by it, or should it be treated as merely a preliminary document, and full effect given to the words in it "subject to a proper contract being prepared by the vendor's solicitors," with the result that until a formal contract is signed the parties are not bound? It is not, I think, necessary to go far back into a number of authorities decided upon this point; it will be sufficient to refer to one volume. The cases were recently carefully considered by Russell J. and by this Court in *Rossdale* v. *Denny* (1) and by this Court in *Coope* v. *Ridout* (2), a very similar case, in which when it came before this Court the decision of Eve J. was affirmed. In the latter case, Lord Sterndale M.R. referred

(1) [1921] 1 Ch. 57. (2) [1921] 1 Ch. 291.

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to the dictum in *Hatzfeldt-Wildenburg* v. *Alexander* (1), in which Parker J. (as he then was) summed up the problem of such an arrangement as this in the following words: "It is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract." That dictum was referred to with approval by Lord Sterndale, and it has also been approved of in other cases. Parker J. gave a guide to the solution of the difficulty by saying that in each case it ought to be considered whether the words contained in such a document were intended to be a condition or term of the bargain, or whether they were intended to be merely the expression by the parties of a desire that a more formal contract should be drawn up of the terms of the contract which had in fact been already agreed upon. Before I go further, I should like to refer to *Rossdale* v. *Denny* (2), where Russell J. went through the cases, and dealt with them, and accepted the rule laid down by Parker J., and his decision was supported on appeal by the Court of Appeal, where Lord Sterndale again referred to that dictum of Parker J., and said that the principle could not be more clearly stated. Therefore in both the cases to which I have referred the statement was accepted by this Court that the words "subject to a proper contract" must be considered as either importing a condition or as merely expressing a desire that a further formal contract should be drawn up of the transaction already agreed upon.

I think when you look at the words here used that what was intended was that the whole document should be conditional on the execution of a proper contract, to be prepared by the vendor's solicitors. I think it is not possible to hold that those words were merely the expression of a desire for a

(1) [1912] 1 Ch. 284, 289. (2) [1921] 1 Ch. 57.

further contract. In my opinion the word " proper " must be given its full meaning, and I think that the intention of the parties was that the full conditions should be considered in a further contract, and that until that further contract was executed there should be no binding contract for the purchase of the property.

That point was not determined by Astbury J., but this Court having come to the conclusion that the nature of that agreement was inchoate, it follows that if at a time before execution of the further agreement negotiations were broken off, the deposit ought to be repaid to the purchasers.

Mr. Micklem, on behalf of the vendor, says that to decide as to the effect of the document of July 10, 1922, one must look at the other documents, the receipt and the schedule which were signed on the same day, and that in those other documents, when reference is made to the document of July 10, 1922, it is referred to as an agreement for sale, and therefore that it must be inferred that the document was intended to be a definite concluded agreement, for that is the way in which it is referred to in those other documents. I think that would be attaching to those documents too great an importance, as they do not alter or detract from the meaning of the important words " subject to a proper contract being prepared by the vendor's solicitors." Younger L.J., in the concluding words of his judgment in *Coope* v. *Ridout* (1), said: " The words then on this alternative construction in effect mean ' subject to the adjustment of a contract by which when it is adjusted our client will be bound.' That is to say it is a condition the fulfilment of which involves an agreement to enter into an agreement which in law is of no force until that agreement becomes binding proprio vigore, i.e., by execution. On either view therefore of its meaning the condition for its fulfilment necessitates the execution of the further agreement referred to before its purpose is achieved and until that purpose is achieved there is no agreement at all." Applying that doctrine to the present case, I have come to the conclusion

(1) [1921] 1 Ch. 291, 298.

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that we must hold that until a proper contract had been prepared, concluded and executed there was no agreement at all.

Mr. Luxmoore says that the result of such a finding is that the money paid on deposit is recoverable, on the ground that there never was a contract, and I think that prima facie he is right, and that the deposit is recoverable and ought to be repaid to the plaintiffs. This 240*l.* was paid "as deposit and in part payment of the said purchase money." It is clear that the purchase money might never become payable, so the character of part payment was lost. But then it is said that it had the character of a deposit, and never lost that character, and therefore the vendor is entitled to retain it. As to the meaning of "deposit," Lord Macnaghten in *Soper* v. *Arnold* (1) says: "Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited, it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not." It is said here that this 240*l.* was a guarantee that the purchasers meant business, and as, through their action, business did not result, the deposit should be forfeited, on the ground that the purchasers should have executed the contract tendered to them. It is, however, no part of the business of this Court to concern itself with the question why the negotiations in this case came to an end and whether any one is to blame in the matter, but the duty of the Court is to note that as no contract was entered into the deposit would prima facie be returnable. What ground is there then for saying that the purchasers who were entitled to break off negotiations have thereby lost the deposit? It is said that they could not seriously enter into these negotiations and then break them off without reason, but that is not for

(1) 14 App. Cas. 429, 435.

us to consider. That they were entitled not to complete the purchase seems clear, and I do not accept the view that the purchasers were paying the deposit as a guarantee or earnest of good faith that they would complete the purchase, because they could have revoked what had up to that time been agreed upon at any moment. It seems to me that when once the negotiations came to an end the rights of the parties were gone, and the purchasers were entitled to receive their money back.

Mr. Micklem, for the vendor, suggests that inasmuch as the deposit is not at the moment a part of the purchase money, it has some other nature attributable to it, under which the vendor, if circumstances justify him in so doing, is entitled to retain it; but I think the onus of showing a right to retain it rests on the vendor, and I agree with Eve J., who takes that view in his recent decision in *Wright* v. *Pocklington*. (1) The authority for it is to be found in *Baylis* v. *Bishop of London* (2), where Hamilton L.J. said: "The question is whether it is conscientious for the defendant to keep the money, not whether it is fair for the plaintiff to ask to have it back," and in cases of "money had and received" in the old forms of pleadings one of the allegations was that the purchaser had lost the use of the money. I cannot agree with Mr. Micklem's view that the purchasers were placed in no difficulty by their money being left in the hands of the vendor, while the vendor was under a difficulty by reason of his having made a preliminary agreement, not for the moment binding, to sell the property, and therefore could not offer it to any one else.

This case, however, does not involve a decision of what a deposit may be in all cases, but simply what it is in this particular case.

In *Howe* v. *Smith* (3) where the nature of a deposit was considered and the right of a purchaser to the return of it, Bowen L.J. said: "The question as to the right of the purchaser to the return of the deposit money must, in

(1) Unreported July 12, 1923. (2) [1913] 1 Ch. 127, 140.
(3) 27 Ch. D. 89, 97.

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each case, be a question of the conditions of the contract. In principle it ought to be so, because of course persons may make exactly what bargain they please as to what is to be done with the money deposited. We have to look to the documents to see what bargain was made." And Cotton and Fry L.JJ. say substantially the same thing. (1) Therefore we have to consider what in fact was the effect of the document of July 10, 1922, not forgetting the contemporaneous documents, and to ask ourselves whether this deposit was by those documents intended to pass irrevocably to the vendor if the purchasers did not carry out the transaction. In all the circumstances of this case, I think the deposit is recoverable by the purchasers. There was no provision made in the documents which would justify the vendor in declining to return it; though if he had, by appropriate words, made provision for that in the document, such a provision could have been upheld.

One word as to the cases cited by Mr. Micklem in support of his contention. No reliance can be placed by him on *Moeser* v. *Wisker* (2) as being in favour of his view, though it may not militate against it. In that case the plaintiff was held to be entitled to recover his money, because of certain clauses inserted by the defendant in the contract which were unreasonable, and it is clear that there was there no ground for suggesting that the deposit was not repayable. But that case has no wider application than to its own circumstances. After Astbury J. had given his decision in the present case, a similar case—*Wright* v. *Pocklington* (3)—was decided by Eve J. on July 12 last, in which he said that with the greatest respect to the decision of Astbury J. in this case, he did not think that the word "guarantee" with reference to a deposit was the right word to use, and he held that the purchaser was entitled to recover the deposit. I agree with that view, which I think is correct, and I prefer it to that taken by Astbury J. in this case. The appeal must be

(1) 27 Ch. D. 95, 101. (2) L. R. 6 C. P. 120.
(3) Unreported July 12, 1923.

allowed, and the plaintiffs are entitled to a declaration that there is no existing contract, and to a return of the deposit.

WARRINGTON L.J. This is a claim by intending purchasers to recover their deposit. Astbury J. has refused to order repayment. The intending purchasers appeal. The case raises two questions, the first is whether the document signed on July 10, 1922, constitutes a binding contract for the sale of the lands in question, and the second is whether, if it does not, the purchasers are entitled to recover the deposit. Astbury J. did not decide the first point. He preferred to assume that the document did not constitute a binding contract, and on that assumption he has held that although there was no binding contract, yet as the purchasers were the persons who had broken off the negotiations they could not recover the deposit.

In this Court it is necessary for us to deal with both points, as the defendant is not willing to accept Astbury J.'s assumption. The document of July 10, 1922, is in these terms. [His Lordship read the document and continued:] The important words in that document are "subject to a proper contract to be prepared by the vendor's solicitors." It has been held over and over again that where you have a document relating to the sale and purchase of land framed in these terms, the object of inserting those words is to avoid binding the parties unless and until the contract referred to has been prepared and signed by both parties. The two most recent decisions on that point, both of which were decided by this Court, are *Rossdale* v. *Denny* (1) and *Coope* v. *Ridout*. (2) It was admitted by Mr. Micklem for the vendor that, so far as the actual words are concerned, it was impossible to contend, in the face of those authorities, that the document of July 10, 1922, embodies anything but a conditional offer and acceptance, but he contends that in this case certain contemporaneous documents contain expressions which compel the Court to give those words a construction

(1) [1921] 1 Ch. 57. (2) [1921] 1 Ch. 291.

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which but for those documents they would not have. In the first place, he says that the document itself acknowledges the payment of the deposit, but in my opinion the payment of the deposit is a neutral fact, and assists neither party. It may be paid by way of guarantee that the purchaser will not break off negotiations without good cause, or it may be paid, as Mr. Luxmoore contends, in anticipation of a binding contract. In any event, the mere fact that a deposit has been paid does not help me. Then it is said that in contemporaneous documents the parties refer to the document as an agreement for sale, but when you know from the document itself that it is not an agreement for sale, the mere reference to it as such in the other documents does not make it so. It is a compendious form of reference to what will become an agreement for sale when another document has been executed. Therefore neither the payment of deposit nor the reference to the document as an agreement for sale is sufficient to alter the prima facie meaning of the document of July 10, 1922. It has been undoubted ever since the decision of Sir George Jessel in *Winn* v. *Bull* (1) that the words "subject to the preparation and approval of a formal contract" in a document prevented the document from being held to be a final agreement of which specific performance could be enforced, and it has been the practice of estate agents to insert these words to prevent parties being imposed upon. In many cases it is important to avoid the disastrous results of entering into open contracts, and I think it would be most mischievous to throw any doubt on the effect and meaning of such expressions. I do not overlook what was said by Lord Sterndale in *Rossdale* v. *Denny* (2) in this Court: "I am far from saying that there may not be an unconditional offer and acceptance of a binding contract although the letters may contain the words 'subject to a formal contract,' but certainly those words do point in the direction of the offer or acceptance being conditional. I do not think it can be put higher than that; I think he is well founded in saying

(1) 7 Ch. D. 29. (2) [1921] 1 Ch. 57, 66.

that the general trend of the decisions has been, where those words occurred, to hold that the offer or acceptance was conditional." But it seems to me that too much importance has been attributed to those expressions of Lord Sterndale, and I think what he meant to say was that the words in question indicate in themselves no binding bargain, and are merely conditional, but that there might be other circumstances which would induce the Court not to give them that meaning in a particular case.

I am clearly of opinion that this document of July 10, 1922, was nothing more than a conditional offer and acceptance, and would only ripen into a contract when a formal document was signed.

Both parties therefore being at liberty to determine the negotiations, is the vendor entitled to retain the deposit? The purchasers, in determining the negotiations, committed no wrong. They did what they were quite entitled to do. Yet it is said that though they were entitled to do what they did, they could do so only under pain of forfeiting the deposit. Whether a vendor is entitled to retain a deposit depends in each case upon the construction of the document under which that deposit is made. The authority for that proposition is to be found in *Howe* v. *Smith* (1), where Bowen L.J. said: "The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract. In principle it ought to be so, because of course persons may make exactly what bargain they please as to what is to be done with the money deposited. We have to look at the documents to see what bargain was made." Then after referring to *Palmer* v. *Temple* (2) he quoted the following observations of Lord Denman C.J. in delivering the judgment of the Court in that case: "The ground on which we rest this opinion is, that, in the absence of any specific provision, the question, whether the deposit is forfeited, depends on the intent of the parties to be collected from the whole instrument." Fry L.J. made statements to the same effect.

(1) 27 Ch. D. 89, 97. (2) (1839) 9 Ad. & E. 508, 520.

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Two rival views have been put before us. On behalf of the vendor it is said that the deposit must be taken to be a guarantee for the conduct by the purchasers of the negotiations so as to bring them to their legitimate conclusion, that is, the signing of a proper contract, and that it was intended to prevent the purchasers from breaking off negotiations for other reasons than default of the vendor. I have great difficulty in arriving at such a conclusion. If the document were a binding contract, there would of course be no doubt as to the result. In *Soper* v. *Arnold* (1) Lord Herschell said: "The deposit is given as a security for the performance of the contract. The appellant admittedly cannot recover that deposit if it was through his default that the transaction was not completed." And when Lord Macnaghten describes the nature of a deposit in somewhat more popular language I think he means the same thing. But where, as here, there is no binding contract, where the whole matter is left indefinite, it seems impossible to say that the purchasers pay the deposit as a guarantee to carry out the bargain, when by the document they have entered into they have not bound themselves to carry out any bargain. Where there is no legal relation, how can it be said that the purchasers have done something which they ought not to have done, or have abstained from doing something which they ought to have done? Then it is said that unless the consequence of the payment of a deposit amounts to a guarantee to complete the purchase the payment of it is perfectly futile. I do not agree, because the purchaser by payment of a deposit shows that he means business. The purchaser has not bound himself, but in order to show a definite intention he is willing to part with money, and run the risk of the vendor spending the money and being unable to return it if negotiations are broken off. The purchasers contend that this is a deposit paid in anticipation of a final contract and nothing more. That seems to me to be the true view. The decision of Astbury J. I think is wrong and ought to be reversed.

There are one or two points raised by Mr. Micklem with

(1) 14 App. Cas. 429, 433.

which I think I ought to deal. He relies upon *Moeser* v. *Wisker*. (1) In my opinion that is a case which never ought to have been reported. It was an ex parte application. The judges seized on a single fact, and decided on that fact. The purchaser in that case had no opportunity of stating his view.

Then Mr. Micklem says that because the terms of the written agreement were arrived at and assented to by the solicitors who were agents for the parties, therefore, although the parties had not bound themselves, they were bound by that assent. I think that would be contradictory, and further, it is not within the authority of solicitors to bind their clients to a contract. The contract was a merely conditional one, and the defendant has not made out his case. Therefore there ought to be judgment for the plaintiffs, whose appeal must be allowed.

SARGANT L.J. I am of the same opinion. The first point is, was there a binding and enforceable contract? That has to be determined by seeing which of two alternative constructions is to be adopted. On the one hand, were the whole terms ascertained and agreed, and was all that was contemplated the mere reduction of these terms into a more formal shape? Or, on the other hand, had the mere heads only of the bargain been ascertained, and was it contemplated that a further contract should be executed which should embody certain further terms? As regards this second contention I desire to say one or two words as to the phrase "contract to enter into a contract." This phrase is used by Parker J. in his classic judgment in *Hatzfeldt-Wildenburg* v. *Alexander* (2), but only, I think, as a secondary or less accurate method of stating the alternative. In the strictest sense of the words the Court will often enforce a contract to make a contract. The specific performance of a formal agreement of purchase is the enforcement of a contract to make a contract; the ultimate conveyance being often in itself in many respects a contract. The same remarks apply

(1) L. R. 6 C. P. 120. (2) [1912] 1 Ch. 284, 289.

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to the specific performance of a clause in a lease giving the lessee an option to purchase the superior interest of the lessor, freehold or leasehold as the case may be. The true meaning of the phrase is that the Court will not enforce a contract to make a second contract part of the terms of which are indeterminate and have yet to be agreed, so that there is not any definite contract at all which can be enforced, but only an agreement for a contract some of the terms of which are not yet agreed.

Dealing then with the matter with reference to the test preferably adopted by Parker J., was there here a condition which was unfulfilled? In my judgment there was. To my mind the words "subject to contract" or "subject to formal contract" have by this time acquired a definite ascertained legal meaning—not quite so definite a meaning perhaps as such expressions as f.o.b. or c.i.f. in mercantile transactions, but approaching that degree of definiteness. The phrase is a perfectly familiar one in the mouths of estate agents and other persons accustomed to deal with land; and I can quite understand a solicitor saying to a client about to negotiate for the sale of his land: "Be sure that to protect yourself you introduce into any preliminary contract you may think of making the words 'subject to contract.'" I do not say that the phrase makes the contract containing it necessarily and whatever the context a conditional contract. But they are words appropriate for introducing a condition, and it would require a very strong and exceptional case for this clear prima facie meaning to be displaced.

Then on the basis that the contract is conditional, what is the result of the payment of the deposit? One obvious object of such payment was that it should form a deposit in the ordinary way if and when the contemplated definite contract was subsequently signed and exchanged. Is it necessary to assume any additional object, such as that the purchaser was giving an interim guarantee that he would enter into a reasonable contract? In my judgment that is not common sense. The parties were not agreeing that they would enter into a reasonable contract, but that they would enter into such

a contract, if any, as they might ultimately agree and sign. I look on the whole payment as being sufficiently explained as being an anticipatory payment intended only to fulfil the ordinary purpose of a deposit if and when the contemplated agreement should be arrived at. I see no sufficient reason for thinking that it was also made to secure the intermediate purpose contended for by the vendor. On that point I prefer the recent decision of Eve J. in *Wright* v. *Pocklington* (1) to that appealed from.

It is clear under *Coope* v. *Ridout* (2) that the vendor might on his side have broken off the negotiations at any time, whether reasonably or not, without incurring any penalty. To my mind it would be an unreasonable view to adopt of the arrangement between the parties that the purchasers should be in a worse position, and only able to break off on the terms of incurring the forfeiture of the deposit.

Appeal allowed.

Solicitor for purchasers : *Francis T. Jones.*

Solicitors for vendor : *Barfield & Barfield.*

(1) Unreported July 12, 1923. (2) [1921] 1 Ch. 291.

W. I. C.

C. A. 1923 Oct. 30, 31.

DODD *v.* AMALGAMATED MARINE WORKERS' UNION.

[1922. D. 552.]

Trade Union—Books and Accounts—Inspection—Employment of Accountant—Proper Case—Bona fides—Onus of Proof—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 14; *Sch. I., cl.* 6.

A member of a trade union who desires to exercise his statutory right of inspecting the books and accounts of the union under the Trade Union Act, 1871, s. 14, and Sch. I., cl. 6, may "in proper cases" employ an accountant to assist him.

Norey v. *Keep* [1909] 1 Ch. 561 approved and followed.

The onus of showing that in employing an accountant the member is not acting bona fide lies on the trade union resisting that inspection.

Decision of Astbury J. [1923] 2 Ch. 236 affirmed.

APPEAL from the decision of Astbury J. (1)

The question arising on the appeal was as to the right of a member of a trade union to inspect with the aid of an accountant the books and accounts of the union. The facts are set out in the report of the case in the Court below. (1)

It is sufficient here to state that the plaintiff was a member of the defendant union, and he brought this action in order to assert his right to inspect the books and accounts of the union by his accountant. The exercise of that right having been denied by the officials of the union, who alleged that his claim was made mala fide and for an improper purpose—namely, with the object of destroying the defendant union and bringing its members into a rival society, Astbury J. on the evidence declined to hold that the plaintiff's claim was otherwise than bona fide, and made an order allowing the inspection asked for on the conditions imposed by Parker J. in *Norey* v. *Keep* (2)—namely, that the agent should not be objectionable to the union on personal grounds, and that he should undertake not to disclose any information obtained by him except to his client.

The defendants appealed.

A. Grant K.C. and *David White* for the appellants. The question is how far the statutory right of a member of

(1) [1923] 2 Ch. 236. (2) [1909] 1 Ch. 561.

a trade union to inspect the books of the union extends. It is submitted that the right is prima facie only personal. No doubt it has been decided in *Norey* v. *Keep* (1) that in a proper case inspection by a skilled agent is permissible. This is not a proper case within that decision. *Norey* v. *Keep* (1), does not mean that there is an absolute right in the member to inspect by an accountant even where mala fides is proved. The rule providing for inspection does not mean that, whatever the member's motive, he is entitled to claim inspection by his accountant. Parker J. in *Norey* v. *Keep* (1) limited the right to a "proper case," but who is to decide what is a "proper case"? There must be cases where the Court will not assist a member in exercising his prima facie right to inspect by an agent. When a person who is hostile to the trade union has become a member of it in order to get the right of inspection for the purpose of spying upon and damaging the union, can it be said that the officials have no right to resist such an inspection? Where the society have reasonable grounds for suspicion that inspection by an agent is being asked for from a bad or improper motive it is submitted that they are entitled to resist it, although it may turn out that their suspicion is ill founded.

[They referred also to *Bevan* v. *Webb* (2); the Trade Union Act, 1871, s. 14; Sch. I., clauses 6, 8, 11, 16; and to the rules of the defendant union, which were framed in accordance with the Act.]

Luxmoore K.C. and *Lavington* for the respondent were not called upon.

POLLOCK M.R. The question here is whether the plaintiff, when he claimed to inspect by an accountant the books and accounts of the defendants, was entitled to make that inspection, or rather whether the defendants were entitled to refuse it to him. The case was argued with reference to the circumstances of a trade union; but it seems to me that the consideration of the point raised is one of wider application, and concerns the right of inspection possessed by members

(1) [1909] 1 Ch. 561. (2) [1901] 2 Ch. 59.

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of companies, partners and others, and does not affect members of trade unions only. [The Master of the Rolls stated the facts and continued:] Astbury J. held on the evidence that the plaintiff was acting bona fide, and that he was entitled to enjoy the privileges granted to him and to all other members of this trade union.

Under the Trade Union Act, 1871, it is provided by s. 14 that the rules of a trade union shall contain provisions mentioned in the first Schedule, and clause 6 of that Schedule provides that there may be inspection of the books and names of members of the trade union by every person having an interest in the funds of the trade union. In fact the rules of this trade union did make provisions in accordance with the statute and r. 25 provided for inspection. The plaintiff is a member of the union and is therefore prima facie entitled to inspect; and he claims, and Astbury J. has found it a legitimate claim, that he should be allowed to inspect by an accountant. The question is whether a member is so entitled to inspect. Counsel for the appellants admits that in certain cases some assistance must be given to an inspecting member, as for instance when that member is blind. In 1901 *Bevan* v. *Webb* (1) was decided by the Court of Appeal. That case was under the Partnership Act, 1870, which provides that partners may inspect the books and accounts of the partnership practically in the same way as provided by the Trade Union Act, 1871, and the question there raised was whether a partner was entitled to inspect by an agent or only personally. It was held that he was entitled to inspect by an agent, and that there was no negation of that liberty in the Act. Collins L.J. there said (2): "What is the object with which this right, or permission, or privilege is given to each of the partners in a partnership? What is the common-sense meaning of it? Surely the object is to enable the partners to ascertain the position of the partnership business. The partnership business is their own business, the books are their own books, and each of them has a right in them. Of course, their rights are qualified and regulated by the

(1) [1901] 2 Ch. 59. (2) [1901] 2 Ch. 68.

corresponding rights of the other partners; but the books which they desire to inspect, and which they have a right to inspect, are their own books. For what purpose is this provision made? It must be that the partners may be able to inform themselves of the position of the partnership. It is said that, because there is no provision either in the articles or in the Act enabling the partners in express terms to inspect by the agency of someone else, the right so to inspect is excluded. But again I ask, what is there to found the presumption that there is such an exclusion, for there is certainly no express exclusion? It must, if at all, be implied, because the word 'agent' has not been used. If I were dealing with a matter not relating to a partnership, I should say that prima facie a permission accorded to a specified person to do an act is accorded to him or his agents." Then he goes on to say: "I should say that prima facie the permission to do a thing carries with it the right to use the instrument necessary to prevent that right so conferred from being rendered ineffective." Later he says that if a partner were unable, through some infirmity or want of experience, to avail himself of the right of inspection personally, he would not be on equal terms with the other partners, unless he were able to make use of some instrument in order to put himself on the same terms. I think therefore that that decision establishes that where a person is under a disability he is entitled, by using an agent, to remove that disability. Stirling L.J. adds this (1): "I agree that when the right which is to be exercised is conferred by some written instrument, as, for example, either by a statute incorporated in a partnership contract or by the articles of partnership, it may be that, upon the true construction of the instrument, it is found that the intention of the parties was that the right of inspection should be a personal right; but, unless you can find something of that nature in the instrument itself, you are not entitled to say that, because an agent is not expressly mentioned, the exercise of the right by an agent is excluded."

Those passages which I have quoted show that this Court

(1) [1901] 2 Ch. 78.

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has decided that an agent may be made use of in order to make inspection effective, and the onus lies on those who wish to deny that right to show why it should not be exercised. In other words when the Act gives the right of inspection it means effective inspection, if necessary by means of an instrument required to make it effective.

In *Norey* v. *Keep* (1) Parker J. (as he then was) followed the decision in *Bevan* v. *Webb* (2), and applied it to the case of a trade union, and held that a member of a society was entitled to inspect by an accountant. He pointed out that the inspection contemplated by the Legislature might be defeated if it were held that only personal inspection was permitted. It seems to me that the law is quite clearly laid down in those two authorities. But it is contended that though there be a prima facie right to inspect, yet there must be some power in the trade union to resist it, if they have proper and reasonable grounds for doing so. As I have said, the onus of establishing that a member has not the right claimed lies on the trade union, and there is nothing in the Act to show that there is in the defendants a discretion or a right to refuse inspection merely because in their uncontrolled judgment they have a suspicion that the plaintiff is acting improperly. I think that the two cases on the subject are quite clear, and Astbury J., after careful scrutiny, has found that the plaintiff is not acting improperly, and that he is entitled to the relief claimed, though he has limited the right by imposing the terms imposed by Parker J. in *Norey* v. *Keep*. (1) I think the judgment of Astbury J. was right and the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. I think that the Act and the rules of the union cannot be read so as to imply that only personal inspection is intended. It is said that a trade union might show certain facts which would justify the Court in refusing to assist a member desiring to inspect by an agent, but the onus in that case is cast on those who dispute the prima facie right of every member of

(1) [1909] 1 Ch. 561. (2) [1901] 2 Ch. 59.

the union. Here the defendants set out to establish special circumstances. Those were, that the plaintiff was actuated by a desire to injure the defendant union; that he was acting in the interests of another and a rival union; and that he was acting mala fide and improperly. The learned judge who tried those issues of fact was satisfied that the plaintiff was a witness of truth, that he was in no way acting for the other unions, and that he was not deserving of the accusation that he was acting mala fide. The result is that upon a question of fact the judge has found that the case alleged by the defendants was not proved, and it is quite impossible for us to interfere with that finding. Therefore the prima facie right to inspect by a skilled agent remains. That right has been qualified by the learned judge by the expression "under proper conditions," and those conditions, as stated by Parker J. in *Norey* v. *Keep* (1), are that the agent should not be objectionable to the union on personal grounds, and that he should give an undertaking not to disclose the information obtained except to his client. Those conditions are, I think, fulfilled in the present case. Counsel for the appellants has invited us to hold that when trade union officials have reasonable grounds for suspicion in regard to the motives of the applicant, then they have an implied discretion to refuse inspection. The result of so holding would be to place entirely in the hands of trade union officials the right of determining what are or are not reasonable grounds upon which they can refuse to allow a member to exercise his statutory right. I agree that the appeal should be dismissed.

SARGANT L.J. I am of the same opinion. The appellants here deny the right of the plaintiff to exercise a legal right which has been clearly established by the decisions: *Bevan* v. *Webb* (2) and *Norey* v. *Keep*. (1) I quite agree that there might be circumstances in which the Court might refuse to assist an applicant desiring to obtain inspection, but the authorities cited show that the onus of establishing that such

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Sargant L.J.

a right should not be exercised lies upon the appellants here. In my view the judge's findings of fact in the action really conclude the matter, and show that this onus has not been discharged. It is said that the question of the reasonableness of refusing such a claim as that of the plaintiff is to be determined by the officials of the trade union. If they, in their judgment, think that a member is acting in a hostile manner or a manner which shows lack of bona fides, then, it is said, they are entitled to refuse the inspection. That may justify them in their domestic forum, but what we have to consider is the legal right of the plaintiff, and that must be determined by the Court in the ordinary way.

Appeal dismissed.

Solicitors: *White & Co.; Frank Daphne.*

G. A. S.

C. A.
1923
Oct. 24, 25;
Nov. 8.

In re WHISTON.

WHISTON *v.* WOOLLEY.

[1922. W. 4046.]

Will—Construction—Gift to Children by Name—One Dead at Date of Will—Rule as to Mistake in Number of Legatees—Lapse—General residuary Bequest—Legacies to be vested at Death of Testator.

A testator who had been twice married made a general bequest of his residuary, real and personal estate (except what belonged to his late wife) to trustees upon trust to sell and divide the proceeds amongst his six named children in equal shares, with a direction that the shares to which his children should be entitled under his will should be vested in them at his decease. He then directed his trustees to divide the personal estate of his late wife, to which he had become entitled on her death intestate, amongst the three named children by her. One of these three children, P., was dead at the date of the will, his father knowing that he had been reported missing during the war, but refusing to believe in his death:—

Held, that owing to the death of P. before the date of the will his one-third share in the specific property lapsed and fell into the general residue, and did not devolve upon the two children of the testator's late wife who were alive at the date of the will. The rule as to a testator mistaking the number of a class of legatees discussed and help inapplicable.

In re Sharp [1908] 2 Ch. 190 distinguished.

Held, also, that the one-sixth share of P. in the testator's real and residuary estate was, in the events which happened, undisposed of, and passed as to the real estate to the testator's heir at law and as to the personal estate to the testator's next of kin.

In re Featherstone's Trusts (1882) 22 Ch. D. 111 enunciates no general principle, but applies only to the facts of that particular case, and is no authority in any other case.

Decision of Eve J. [1923] 2 Ch. 253 affirmed on the first point and reversed on the second.

APPEAL from the decision of Eve J. (1)

William Harvey Whiston, by his will dated September 27, 1918, after directing payment of his debts and making pecuniary and specific bequests, gave all the furniture, plate, linen, china, pictures, and all other his household goods and effects at his dwelling house at Holme Hurst in the county of Derby (except what belonged to his late wife, Mary Elizabeth Whiston), and all his horses, carriages, farming stock, and all his moneys, stocks, shares, and securities and all the rest and residue of his personal estate (except such portion as belonged to his said late wife) and his messuage, land and outbuildings known as Holme Hurst, and all the rest and residue of his real estate unto and to the use of his sons William Reginald Harvey Whiston, Arthur Norton Whiston, and Philip Selwyn Whiston, and his sister-in-law, Emma Wheeldon, upon trust to sell and convert the same into money, and to pay the clear proceeds amongst all his children, Alice Beatrice Woolley, William Reginald Harvey Whiston, Arthur Norton Whiston, Gladys Mary Osborne, Philip Selwyn Whiston, and George Oswald Whiston, in equal shares and proportions and he directed that the shares to which his said children should be entitled under his will should be vested in them at his decease. And the testator, after reciting that owing to the death of his late wife M. E. Whiston, intestate, he had become entitled to the whole of her personal estate, directed his trustees to divide certain articles amongst his three children by his late wife—namely, Gladys Mary Osborne, Philip Selwyn Whiston, and George Oswald Whiston, and to sell the stocks, shares, and funds formerly belonging

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to his late wife, and after paying legacies of 150*l.* to each of the three children by his first wife to pay and divide all the rest and residue of the moneys, stocks, shares, and funds unto and equally between Gladys Mary Osborne, Philip Selwyn Whiston, and George Oswald Whiston, in equal shares, and as tenants in common, absolutely.

At the date of the will Philip Selwyn Whiston had been reported as missing in the war, but his father declined to believe that he was dead. Subsequently he was reported by the War Office as having been killed in March, 1918, being then a bachelor and intestate.

The testator died on March 8, 1922, and his will was proved by the surviving executors on June 2, 1922.

The testator left five children surviving—namely, A. B. Woolley, W. R. H. Whiston and A. N. Whiston, being his children by his first wife, and G. M. Osborne and G. O. Whiston, being children by his second wife (Mary Elizabeth Whiston).

An originating summons was taken out by the trustees of the will for the determination of the questions (inter alia): (1.) Whether the one-third share of the portions of the testator's estate derived from his second wife and given to Philip S. Whiston devolved upon the two defendants G. M. Osborne and G. O. Whiston in equal shares, or came under the gift of the testator's general residuary estate; and (2.) whether the residuary real and personal estate became divisible in equal fifth shares between the five children of the testator in the will named who survived him, or whether the one-sixth share given to Philip devolved upon the testator's heir at law, or next of kin as undisposed of.

Eve J. held that, owing to the death of Philip before the date of the will, his one-third share of the specific property lapsed and fell into the general residue, and did not devolve upon the children of the second marriage who were alive at the date of the will. He further held, following *In re Featherstone's Trusts* (1) that having regard to the declaration in the will that the shares of the general residue were to be

(1) 22 Ch. D. 111.

vested legacies at the testator's death, the whole residue passed to the five children who survived the testator.

The two children of the second marriage appealed. The appeal was heard on October 24, 25 and November 8, 1923.

Dighton Pollock and *Beebee* for the appellants. There is no lapse of Philip's share. It was the manifest intention of the testator that the property which had belonged to his second wife should go to the children of that wife to the exclusion of the children of his first marriage. The testator made the gift to them in the belief that there were three and he gave them the property nominatim, but, as the facts turned out, at the date of the will there were only two, and those two take under the gift in equal shares. This construction of the will is supported by the decision in *In re Featherstone's Trusts* (1), in which case the will, as here, contained a direction that the shares to which the testator's children should be entitled under his will should be vested in them at his decease. Inasmuch as at that time there were only two of the three named children surviving those two take in equal shares. If that decision is correct it governs the whole of the will in this case and not merely the residue.

Again, the testator made a mistake in the enumeration of his children by his second wife, but his dominant intention was to benefit the three whom he named and them only. That dominant intention prevails notwithstanding that there has been a mistake in their enumeration. The Court will reject the specified number on the presumption of mistake, and hold that the children in existence at the date of the will are entitled: *In re Sharp.* (2)

Roope Reeve K.C. and *R. H. Hodge* for Alice Beatrice Woolley, a child by the first marriage; *Whinney* for the heir at law of the testator; and *Lyttelton Chubb* for the trustees of the will, one of whom was the remaining child, were not called upon.

POLLOCK M.R. stated the facts and continued. Perhaps it is not unimportant to observe that, having provided that

(1) 22 Ch. D. 111, 121. (2) [1908] 2 Ch. 190.

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the property of his second wife should be divided equally between the three children of his second wife, the testator then proceeds to bequeath a legacy of 150*l.* out of the second wife's money to each of the three children of his first wife.

Now it is said that the intention of the testator was that the property which had belonged to his second wife should go to the three children of that wife to the exclusion of the other children, and that that intention ought now to be given effect to, and that inasmuch as it is now found that there are only two of them, because Philip is dead, the portion that was destined for Philip ought now to be divided equally between Gladys and George. It is to be observed that when the testator is dealing with the property of his second wife the three children are mentioned by name. Mr. Beebee says that although the names are put in, the gift is in substance to the children of the second wife, but Mr. Dighton Pollock, I think, admitted that although there is this description, " my three children by my said wife," the testator goes on to treat them nominatim —Gladys, Philip and George. It is a bequest to them nominatim and not as a class. It is suggested that although that property which belonged to the second wife is given to the three children nominatim the Court can find in the will words which justify and entitle it to hold that as Philip has dropped out the only persons who are to benefit are the two surviving children of the second wife, namely Gladys and George.

Two points are made. The first is made under *In re Featherstone's Trusts.* (1) In that case Kay J. found in the will words similar to those in the present will, which are these : " I direct that the shares to which my said children shall be entitled under this my will shall be vested in them at my decease," and it is said that if that decision of Kay J. is followed and applied to this particular case the Court can make use of that direction to find that only the children who were living at the time of the testator's decease were to take the legacies or bequests made to them, because it has to look at the time when the shares vest in

(1) 22 Ch. D. 111.

them—namely, at his decease, and to see which of the said children were alive at the time when the shares could vest, and that inasmuch as only Gladys and George were alive at the time of that vesting, the right way of reading the direction in the will is to leave out Philip and to hold that Gladys and George take in equal shares the property of the second wife, save and except, of course, so far as it is dipped into for the purposes of the legacies to the three children by the first wife. It is said that if the Court does not make use of those words in that way it is not giving full effect to all the words of the will.

It appears to me that *In re Featherstone's Trusts* (1) is a very special case. It is, as I think my learned brothers in their judgments will more fully explain, a case which depends upon its own facts. It can hardly be taken to be an authority that in all cases where you find this direction as to the time in which the vesting is to take place you are to use those words as overriding or having a predominant effect upon subsequent portions of the will. Although it may be said that this direction is otiose or unnecessary it appears to me that that is not an unknown result of using certain words in a will, and that, at any rate, *In re Featherstone's Trusts* (1) is not an authority under which one could declare that this direction is an overriding direction so as to alter the effect of the meaning of the subsequent clause where he deals with the property of the second wife. I think *In re Featherstone's Trusts* (1) will be left as a case dealing with its particular circumstances, and not one for general application.

A second point taken is that the children of the second wife, Gladys and George, are entitled to take in equal shares, because the Court may apply the rule as to mistake in number of legatees, and hold that the testator has made a mistake in the number of the children who at the time when he made his will were in fact alive. For that rule *In re Sharp* (2) is cited. No doubt in that case in which legacies were given in the following terms "to the three daughters of my late niece Sarah Mitchell two hundred and fifty pounds each and to the six children of the late Samuel Frederick Okey two

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hundred pounds each," the Court held that the one surviving child of S. F. Okey, as the representative of the class, took in full under the rule that where a mistake has been made in the number of the children the Court will declare that the purpose of the will can be carried out by declaring that the one child who survived represented the class and was entitled to the legacy, and that the enumeration of the children was a mistake. It is to be pointed out that in this case, as is quite clearly stated in the will, and indeed is admitted, we have a bequest under which the three children of the second wife are named, and we have not, therefore, as in *In re Sharp* (1), a description, but a bequest nominatim to the children of the second wife. It seems to me that it is not possible to say that where you have a bequest to children named and specified you can apply the rule of mistake in numbers which was applied in *In re Sharp*. (1) The result therefore is that there is nothing in the direction which is made in the earlier portion of the will as to when the shares are to vest nor in the application of the doctrine of mistake as illustrated by *In re Sharp* (1) on which we can say the will should be so interpreted that Gladys and George are to take in equal shares when it is discovered that, as the fact is, Philip is no longer alive.

Then it was contended by Mr. Dighton Pollock and Mr. Beebee that the Court ought to look for what was the dominant intention of the testator. It is said that there is sufficient in the will to show that the dominant intention was that only the three children of the second wife, and those children alone, were to take the benefit of the property which had belonged to the second wife. I have already called attention to the fact that out of that property three legacies of 150*l.* each are left to the children of the first marriage, so that the three children of the second marriage do not take the whole of the property of the second wife in division among the three of them, but that property is dipped into for the purpose of giving benefits to the children of the first marriage. Next, is it so clear that the testator intended that all the

(1) [1908] 2 Ch. 190.

property of the second wife should go to the second family in any event? I think that what I have said about the legacies given to the children of the first wife militates against that view, and, more than that, that the position must be considered when the testator made his will. He may have had an equal affection for all the six children. It is quite clear that he was anxious to preserve, in a spirit of optimism, such rights to Philip as his brother and sister Gladys and George should have; but it does not necessarily follow that he meant if Philip could not take by reason of his death that the brother and sister should benefit by dividing Philip's share between them. It seems to me just as reasonable to suppose that if he had known of Philip's death he might have increased the amounts of the legacies given to the three children of the first marriage, or he might have disposed of the property in some other way. For my own part I cannot see that there is to be gathered from the will any dominant intention that the children of the second wife are to take the whole of the property of the second wife to the complete exclusion of the children of the first wife.

In my opinion, therefore, the appeal fails. The question that we have to determine is "whether the one-third share of the portions of the testator's estate derived from his said wife . . . . given to or for the benefit of the testator's son Philip Selwyn Whiston . . . . devolved (*a*) upon Gladys and George in equal shares or (*b*) under the gift in the testator's will contained of his residuary estate . . . . or (*c*) upon the next of kin." I agree absolutely with the reasoning of Eve J., that Philip's one-third share is not to be divided between his brother and sister. That means that it would fall into the residuary estate. But that residuary estate is to be divided among the children. Now we know that there are but five children instead of six, and the result I think will be that with regard to the one-sixth of the one-third of the property coming to Philip there will be an intestacy. That may make it necessary to modify the declaration or order made by Eve J. The particular order that will be made by this Court will be pronounced by Warrington L.J.

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WARRINGTON L.J. I am of the same opinion. The direct question that arises for decision is on the construction of that portion of the testator's will in which he is dealing with the estate, which was entirely personalty, of his deceased wife, Mary Elizabeth Whiston, being his second wife. [His Lordship stated the facts and continued :] We have therefore a gift to three persons, Gladys, Philip and George, in equal shares and proportions as tenants in common absolutely. Philip was dead when the will came into operation. Therefore, according to the ordinary and perfectly well known rule of law, his share would lapse and would be undisposed of in so far as this specific declaration is concerned. But it is said that there are two reasons why in the present case that rule of law is not applicable. I will deal with those two reasons in the order in which the matter has been argued by counsel for the appellants.

The first contention is this, that in an earlier part of the will, where the testator in dealing with his residuary estate gives a direction that it was to be held in trust for all his six children by name in the same way as he had directed that the specific portion of his estate should be held for the three children, he has inserted a declaration or a direction : " The shares to which my said children shall be entitled under this my will shall be vested in them at my decease." Now it has been argued before us, first, that that declaration applies to the shares taken under the subsequent specific trust, and secondly, that the effect of that declaration is to convert the gift to the three, Gladys, Philip and George, from a gift to those three in equal shares and proportions to a gift to such of those three as shall be living at the testator's death. At first sight it seems absolutely impossible to give so wide an interpretation to such words as those. Those words merely express what if they were not there would be the effect of the gift standing by itself as it is framed. Under a gift to three persons in equal shares without more each of those shares vests at the death if the testator and not later. I say that advisedly, because when the testator provides that the shares shall vest at his death it is impossible to

suppose that he is guarding against a suggestion that any such share vested in his lifetime. He must have been thinking, although there was no ground for it, of a possible suggestion that some ingenious person might make that these shares do not vest until some subsequent time; but he cannot have been guarding against the possible suggestion that they vested in his lifetime. That is quite clear. I think I have said enough to indicate that in my view the declaration, assuming it to apply as I do for this purpose to the specific gift, does not affect what would be the natural construction of the gift if those words were not there. The learned judge had at the same time the same point raised not in reference to this specific gift but in reference to the gift of the residue which for this purpose is in the same terms, because it is a gift to the six named children, including Philip, in equal shares, and he has taken the view that the effect of the words to which I have referred is to convert that gift into a gift to the five who were living at the death of the testator.

Now it is clear in our view that the declaration which the learned judge has made in respect of the gift of the residue is incorrect. There is no appeal from that declaration, and, as I will point out directly, the declaration, though incorrect, makes no difference in the result to the rights of the parties; but I do not think that we ought to allow the judge's direction to go without the necessary amendment, as the point has been argued in reference to another part of the will. The learned judge has expressed no opinion of his own upon the construction and effect of that particular clause, but has taken the view that the decision of Kay J. in *In re Featherstone's Trusts* (1) is a decision on the point before him, and that he ought to follow it, and he has accordingly done so. With all respect to the learned judge I think that in so expressing his opinion he was wrong. The decision in *In re Featherstone's Trusts* (1) was upon a very peculiar will and under a very peculiar set of circumstances. The testator there had given his residue to be divided equally amongst all the children of his brother-in-law, John Dowson and Robert

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Abbey, and had directed that the same should be vested legacies at the time of his decease. According to the true construction of the will that was a gift to Robert Abbey as an individual and the children of his brother-in-law John Dowson as a class. Robert Abbey had died in the lifetime of the testator, and the question was whether the share which devolved upon Robert Abbey as an individual was disposed of. The learned judge held that it was not, but that by the effect of those words, "the same shall be vested legacies at the time of my decease," the share which Robert Abbey would have taken passed to the children of John Dowson, that is to say, that the words amounted to a direction that Robert Abbey should only be entitled to the share if he was living at the death of the testator, so that there was no absolute gift to him. I do not say whether that decision was right or wrong, but in my opinion it has no application to the present case. The decision was on the very peculiar facts and circumstances of that case. It enounces no principle, and is no authority in any other case. I much regret that it was ever reported. The reporting of such cases tends to encourage the apparently incorrigible habit of citing as authorities for the decision on questions of construction decisions on special circumstances utterly different from the expressions and circumstances in the case under discussion.

As I have said, the point was decided by the learned judge in reference to a gift of residue. That decision was obviously wrong in the opinion of this Court, and although it has not been appealed from I do not think we ought to allow the order to go without amendment. What I suggest is this: There are two declarations made by the learned judge. The first is that the one-third share of the property derived by the testator from his late wife by his will given to or for the benefit of his said son Philip devolves under the testator's will under the bequests of his residuary real and personal estate. So far that seems to be right. Then he has gone on to make this declaration: "This Court doth declare that according to the true construction of the testator's will his residuary real and personal estate became divisible in equal one-fifth

shares between the testator's five children named in the will who have survived him." I think therefore that we ought to make a declaration somewhat in this form: "Declare that according to the true construction of the testator's will, and in the events which have happened, the one-third share by the specific bequest of property of the testator's late wife M. E. Whiston given to Philip fails by reason of the death of Philip in the testator's lifetime and falls into the general residue of the testator's estate," and then go on to declare that according to the true construction of the testator's will and in the events which have happened the one-sixth share of Philip in the testator's residuary real and personal estate (including his one-sixth of the one-third of the property of the testator's late wife which fell into residue as above mentioned) was in the events which happened undisposed of and passes as to the real estate to the testator's heir at law and as to the personal estate to the testator's next of kin.

As to the second point, I entirely agree with the judgment of Eve J. on that, and have nothing to add.

SARGANT L.J. As to the main point decided by Eve J. I am entirely in agreement with his judgment. The testator, both in the specific gift in question of the second wife's property, and also in the preceding gift of residue, gave to the beneficiaries in the most definite and individual way possible, that is by naming them by their several names. The reference in the specific gift to the fact that his three younger children were the children of his second wife was, in my view, inserted only for the purpose of explaining what might otherwise appear to be an unfair extra provision for those three children. In my judgment *In re Sharp* (1) does not apply here, and the decision in that case would have been very different if the six children of Samuel Frederick Okey had been identified by their names in the way in which the three children of the second family were identified here. That being so, the learned judge was quite right in holding that the specific gift of the second wife's property failed as to one-third, and fell into residue.

(1) [1908] 2 Ch. 190.

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But I am unable to agree with the further decision of the learned judge as to the ultimate destination of this part of the specific fund under the gift of residue. I do not think *In re Featherstone's Trusts* (1) really applies here. That was a very special case, and all that Kay J. did was to hold that the clause as to immediate vesting might be interpreted as providing that Robert Abbey, who was not a member of the class with the children of Dr. Dowson, should, for the purposes of taking, be treated as on the same footing as to survivorship as those who were strictly members of the class. I think the case has no application where such a clause follows a clearly defined gift to individuals. It is true that apart from such an interpretation the clause has to be treated as superfluous and expressing nothing more than had already been effected; but if every superfluous and unnecessary word in a will must have effect given to it by modifying preceding clear words of gift to the same effect, a new kind of uncertainty of wide application will be introduced into the construction of wills. As regards the correctness of the decision in *In re Featherstone's Trusts* (1) I wish to reserve my opinion.

There is however a further difficulty, which has partly arisen, from the order in which the two points were argued before Eve J., because although the specific gift of the wife's property deals only with the personal estate, I notice in the affidavit that the testator's residue, apart from the lapsed share of the specific property, does comprise a considerable amount of real estate. Therefore there will, with regard to that, be a difference caused by our decision from the effect produced by Eve J.'s decision. I see that there is no appeal by the heir at law, who was the person really prejudiced, against a decision which deprived him of his special rights in the real estate, but I suggest the proper way would be that we should give leave to the heir at law to appeal, notwithstanding that the time may have elapsed. I remember one or two cases where beneficiaries under a trust who were on the same footing had a decision given against

(1) 22 Ch. D. 111.

them, and there was an appeal to this Court only by one or two of the beneficiaries, and not by all, and the Court having put a construction on the trusts of the will on that appeal which was favourable to those beneficiaries, went on to say that although the other beneficiaries had not appealed, it must necessarily follow from the construction put by the Court on the trusts that they would, in the result, get the benefit of the appeal, although they had not run the risk of the appeal.

At the conclusion of the judgments the Court after some discussion gave leave to the heir at law to appeal from the judgment of Eve J. and directed that counsel for the trustees should prepare minutes of the order.

Nov. 8. Minutes having been prepared and an appeal entered by the heir at law the matter again came before the Court, but the parties did not elect to argue further. The Court thereupon made one order on the two appeals substantially in the terms suggested by Warrington L.J. in his judgment, dismissing the appeal of the two children of the second wife and allowing that of the heir at law.

Appeal of children of second wife dismissed.
Appeal of heir at law allowed.

Solicitors: *Maude & Tunnicliffe, for Taylor, Simpson & Mosley, Derby; Greenfield & Cracknall, for Whiston & Sons, Derby; Peacock & Goddard, for Moody & Woolley, Derby.*

W. I. C.

EVE J.
1923
Nov. 14, 15.

KRUSE *v.* SEELEY.

[1922. K. 943.]

Moneylender—Contract—Security—Promissory Note—Pledge of Furniture—Excessive Interest—Transaction "harsh and unconscionable"—Surrounding Circumstances — Statutory Jurisdiction — Moneylenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-ss.* 1, 2.

By a promissory note, dated July 10, 1922, the plaintiff, who was a married lady, promised to pay 500*l.* to the defendant, a moneylender, for a loan of 300*l.* The money was to be repaid by twenty-four consecutive monthly instalments, and on default in payment of any instalment the whole amount remaining unpaid became due. Interest was to be at the rate of 1*s.* in the pound per month. By an instrument of charge dated the same day, in consideration of this advance of 300*l.* secured by the promissory note for 500*l.*, it was provided that certain furniture and chattels belonging to the plaintiff and which had been delivered into the defendant's possession should be held by him as security for the payment of 500*l.* In the event of default of payment of the promissory note, or any instalment, the defendant was to be at liberty to sell the furniture and chattels and repay himself thereout for all principal, interest, and costs. The furniture had been purchased some eighteen months before for 175*l.* The plaintiff had expected to receive 400*l.* as previously suggested by the defendant, but being in extreme financial straits she had no alternative but to execute the two documents when put before her on July 10, 1922. The plaintiff failed to pay the first instalment due under the promissory note, and the whole 500*l.* became payable. If all payments had been duly made the rate of interest would have been at 82½ per cent. :—

Held, that inasmuch as the loan was not made on personal security only, but was adequately secured by the goods pledged, the rate of interest, which might not have been regarded as necessarily excessive for a loan on personal security only, became outrageous and extortionate for an advance upon good security.

Held, also, on the evidence, that the defendant had made an unconscionable bargain and tricked the plaintiff into the position in which she was placed on July 10, 1922; and in the exercise of its jurisdiction the Court would accordingly direct that the contract should stand as a security for 300*l.* with interest at the rate of 15 per cent. from July 10, 1922, and the plaintiff must pay the costs of the storage of the furniture and of the insurance. On these payments being made the defendant must deliver up the furniture to the plaintiff.

ACTION WITH WITNESSES.

The plaintiff in the action was Mrs. Lilian Kathleen Jennings, who had married again since the commencement of the action. The defendant, Robert Norman Seeley, was

a registered moneylender and was sued as N. R. Seeley. In January, 1922, the plaintiff was living at Cherry Garden House, Folkestone, with her two children, and being in great financial difficulties came to the defendant and asked for a loan of 500*l.* to be secured upon a bill of sale on her furniture. Later on in March, 1922, a valuation of the furniture at 330*l.* was made on behalf of the defendant.

On May 13 the defendant offered by letter to advance 400*l.*, and suggested that the plaintiff should deposit all the furniture and other chattels at her house with Messrs. Davis & Davis, of Folkestone, in the defendant's name. On July 5 the plaintiff's house was completely stripped of its furniture and things, and they were stored as agreed. All these chattels had been insured a few days before for 500*l.* Up to this no definite promise had been given by the defendant to advance any sum whatever. On July 10 the plaintiff attended at the defendant's office, at which meeting the defendant's solicitor was present and produced the two documents next stated for the plaintiff's signature. She had seen no drafts before, and heard for the first time that 300*l.* only, and not 400*l.*, was to be advanced; but being in great financial difficulties she signed the documents after reading them over.

By the promissory note dated July 10, 1922, the plaintiff promised to pay the defendant 500*l.* for value received, payable by twenty-four consecutive monthly instalments of amounts varying from 50*l.* to 5*l.*, and payable on the tenth day of each succeeding month down to July 10, 1924. The first instalment was 50*l.*, to be paid on August 10, 1922, and on default in payment of any instalment, or any part thereof, the whole amount remaining unpaid was to become due and payable forthwith. This note was to carry interest at the rate of 1*s.* in the pound per month from the day of maturity until payment.

By an instrument of charge dated on the same day, in consideration of the defendant having advanced to the plaintiff 300*l.*, for which the plaintiff had given the promissory note for 500*l.*, set out in the first schedule, it was provided

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that the plaintiff having that day delivered to the defendant certain chattels and things specifically described in the second schedule thereto (being the furniture and chattels stored in the named depository), the same were to be held by the defendant in his possession as security for payment of the 500*l*. In the event of the promissory note not being met at maturity, or any instalment, or any part thereof, not being paid on the stipulated day, the defendant was to be at liberty to sell the chattels by public auction or private sale for any price he considered reasonable, and after payment of all costs, charges, and expenses in connection therewith, and the amount payable for principal and interest, to pay any surplus there might be to the plaintiff. The second schedule contained a complete list of the furniture taken from the plaintiff's house, together with silver, and plated articles, china, cut glass, and wedding presents.

The furniture had been bought at intervals from the end of 1920 to the beginning of 1922 for 1750*l*. The silver, china, glass, etc., were stated to be worth some 300*l*. The plaintiff at this interview on July 10, 1922, also made a statutory declaration that the furniture belonged to her absolutely. After the documents were signed the defendant drew a cheque for 300*l*. in favour of the plaintiff, who indorsed it. The defendant cashed it at a bank and handed over the notes to the plaintiff, who was required to pay out of it 24*l*. 6*s*. for expenses.

The first instalment of 50*l*. due under the promissory note was not paid. On August 16, 1922, the plaintiff's solicitor tendered 300*l*. to the defendant with twelve guineas for interest, but this was not accepted. On August 18, 1922, the writ in the action was issued, and it was not until after that date that copies of the charge and promissory note with the amounts and dates for payment of instalments were obtained. There was evidence by an actuary that the interest on the amount actually lent, if all the instalments had been duly paid, would be 82½ per cent. If the whole 500*l*. became due on August 10, 1922, the interest would be about 1000 per cent.

By the statement of claim the plaintiff alleged that the interest charged was excessive, and the transaction harsh and unconscionable within the meaning of the Moneylenders Act, 1900; and she invoked the jurisdiction of the Court to reopen it. She claimed a declaration that she was entitled to redeem the furniture and chattels upon payment of the sum actually lent together with interest at a reasonable rate, and all reasonable charges; and that she might be relieved under the Act from paying to the defendant any sum in excess of that adjudged by the Court to be fairly due for principal, interest, and charges; and that on payment thereof the defendant might be ordered to hand over to her all securities in his hands relating to the loan and any policies of insurance. The defendant counterclaimed that the plaintiff not having paid the first instalment due on the promissory note the whole 500*l.* had become due, with interest at 60 per cent., or as the Court might deem just.

Gover K.C. and *A. Guest Mathews* for the plaintiff opened the case, and evidence on both sides was called. The result of the evidence appears from the judgment.

Clayton K.C. and *Frank G. Enness* for the defendant. The first question is whether the transaction should be reopened at all. Two conditions had to be proved (1.) that the interest was excessive, and (2.) that the bargain was harsh and unconscionable. The law was stated in Lord Loreburn's judgment in *Samuel* v. *Newbold*. (1) Interest may be so excessive as to be evidence of itself that the transaction is harsh and unconscionable. But that is not the case here. The rate of interest is not the true test; it depends upon the risk incurred. A lump sum is taken to cover that risk, and the matter must be looked at also from the point of view of a prudent lender. Under the terms of the Moneylenders Act the Court may grant relief from the payment of any sum in excess of that adjudged by the Court to be fairly due "having regard to the risk and all the circumstances." In *Carringtons, Ld.* v. *Smith* (2) the Court considered the risk

(1) [1906] A. C. 461, 466, 467. (2) [1906] 1 K. B. 79, 89.

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and all the circumstances, and held that 75 per cent. interest was reasonable and not excessive within the meaning of the Act, and the transaction was not harsh or unconscionable. We submit that that is a sound and commonsense decision, and emphasizes the difficulty of saying what is "excessive" interest. Most of the cases on this point were referred to in that judgment. In the present case there was great risk, as the lady was surrounded with debts, and there had been a distress for rent. There was risk also as to the furniture, though the security of a pledge was better than that of a bill of sale. Under all the circumstances, we leave it to the Court to say what is fair and reasonable interest, and we are entitled under the counterclaim to judgment for what the Court adjudges to be right.

Gover K.C. and *A. Guest Mathews* for the plaintiff. The whole proceeding here was a trap for the unwary borrower. The lady was put into such a position on July 10, 1922, that she had no alternative but to sign these documents if she expected to get any money at all. The intention of the Legislature under the Moneylenders Act, as stated by Vaughan Williams L.J. in *Poncione* v. *Higgins* (1), was to deal with cases of persons in financial distress coming to moneylenders to borrow money in order to get out of their financial distress, and not to deal with the case of persons who were in a position to make their own bargain on terms of equality with the moneylender.

Each case has to be considered on its own surrounding circumstances. The 300*l.* advanced was amply secured by the furniture, plate, and other articles pledged and in the defendant's possession. The remarks of Channell J. in *Carringtons, Ld.* v. *Smith* (2) as to the cases which the Act was designed to meet directly apply to the present case. The whole transaction is harsh and unconscionable, as in *Samuel* v. *Newbold* (3) and *Halsey* v. *Wolfe.* (4) The interest alone may be held to be so excessive as to be evidence of an unconscionable bargain. As to the security. In *Salaman* v.

(1) (1904) 21 Times L. R. 11.
(2) [1906] 1 K. B. 79, 89.
(3) [1906] A. C. 461.
(4) [1915] 2 Ch. 330.

Blair (1) there was security, and the interest was from 40 to 50 per cent. Here the furniture pledged as security was insured for 500*l.*, and certain articles alleged to be missing from the list when the valuation was made were merely of the value of 12*l.* The valuation of 330*l.* was clearly made as low as possible, and is unsatisfactory. The silver, china, glass and other articles in the schedule were alone sufficient security for 300*l.* We ask for the usual redemption order. The counterclaim is for the whole 500*l.*

EVE J. The statutory jurisdiction invoked by the plaintiff in this case confers upon the Court a very wide discretion, a discretion indeed the very width of which emphasizes the necessity of extreme caution in its exercise. In approaching the investigation of any particular set of facts alleged to make out a case for the interference of the Court with a contract come to between persons of full age there are many matters which call for consideration. First, I should place what I will call the status of the contracting parties. Were there any, and if so, what disparities of age, intelligence, education, or capacity between them? In the next place one has to examine whether there was any trickery, overreaching, undue pressure, or other reprehensible conduct not necessarily amounting to fraud or misrepresentation on the part of either, and if so, how far did it influence the action of the other; and thirdly one must inquire whether each party understood the contract and appreciated the obligations thereby undertaken, and the consequences resulting alike from its fulfilment as from any breach of its provisions. It may well be that the answers to these inquiries will be such as to afford good grounds for the exercise of the discretion; on the other hand, while not affording such good grounds in themselves they may constitute contributory elements in favour of its exercise when the further relevant matters have been examined. But it does not follow, even if no disturbing answer is returned to any of the foregoing inquiries, that the contract may not be varied, although obviously

(1) (1914) 111 L. T. 426.

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the burden of a plaintiff seeking to avoid the contract who cannot show any disparity between himself and his co-contractor, or any want of knowledge on his part or any misconduct on the part of the defendant, is materially increased. The next set of circumstances to be considered are (1.) the nature of the contract, and (2.) the relevant circumstances in which it was entered into. In this case I do not think it would be right to hold that there was any such disparity in the status of the contracting parties as to be an essential factor in the plaintiff's favour. True it was a case of a lady negotiating with a man, but she is an educated lady of full age who showed by her evidence that she was alive to the position, and I feel I should be doing her an injustice were I to hold that in education, intelligence, or mental capacity she stood on any lower level than the defendant. She suffered under the disadvantages commonly present in the case of any one negotiating a loan with a money-lender—that is to say, she was desperately in want of money. I pass over for the moment the question whether there was any misconduct on the defendant's part, and inquire whether the plaintiff understood the contract? In a sense it is obvious she did; according to her own evidence she read the documents and understood the language used, but although she understood she was agreeing to pay 500*l.* by twenty-four monthly instalments for an advance of 300*l.* it is not suggested that she appreciated the rate of interest this agreement involved in the respective alternatives of the money being so paid or of default being made in any one instalment.

The contract between the parties is contained in two documents, the one the promissory note for payment of the 500*l.* in the manner I have mentioned, and the other a mortgage or pledge of certain furniture therein specified which was already stored with Messrs. Davis & Davis at Folkestone in the name of the defendant. [His Lordship stated the concluding terms of the charge.] Looking at the contract it is a contract for an advance on security, and on a security which, upon the evidence, I have no hesitation in holding

was to the knowledge of the lender a good and sufficient security for 300*l.* For this advance 500*l.* was to be paid by instalments spread over two years, and had the sum been so paid the rate of interest paid by the borrower would have been 82½ per cent.; default in payment of the first instalment would have increased the rate to something like 1000 per cent. Before the plaintiff can obtain relief under the statute the Court must find that the rate of interest, or some charge by way of bonus, or accommodation for the loan, is excessive. I have therefore first to ask myself, looking at all the circumstances in which this secured loan was made, whether the bonus of 200*l.* was or was not excessive. I respectfully agree with what was said by Channell J. in *Carringtons, Ld.* v. *Smith* (1) as to the difficulty of determining what is excessive interest in the case of a loan on personal security only. The ordinary prudent person would no doubt stand aghast at being called upon to pay interest at 60*l.* per cent., but the matter is really not one to be approached from the standpoint of the ordinary prudent individual; it is to be examined with reference to the class of person who resorts to moneylenders the circumstances in which applications to moneylenders are ordinarily made, and not least to the question whether the security the applicant can offer is one upon which any sane person could be expected to lend money on anything but very exacting terms. In the present case I should not be prepared, if the loan to this lady had been on personal security only, to hold that the rate of interest, high though it is, was necessarily excessive. When it was being negotiated the lady, it is true, was living in a tolerably large house well stocked with furniture; but she was horribly in debt, her rent had not been paid, and there were claims by numerous tradesmen and by the local authorities for overdue accounts and rates which she was quite unable to meet. In these circumstances one can well appreciate that any application to a moneylender offering only personal security would have met with a refusal, or would have been entertained only upon very expensive terms, and although 82½ per cent. is

(1) [1906] 1 K. B. 79.

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a very high rate of interest, I do not think it would be so excessive as of itself to make the contract harsh or unconscionable.

But this loan was not made on personal security only, it was adequately secured by the goods pledged, and a rate of interest which might not have been regarded as excessive for a loan on personal security becomes outrageous and extortionate for an advance upon good security. Before making the advance the defendant had satisfied himself of the plaintiff's title, and had obtained a valuation of the furniture upon the receipt of which he had expressed his willingness to entertain an advance of 400*l.* It is now said that the valuation was 330*l.*—the furniture having cost some 1700*l.* and more within the eighteen months preceding such valuation, but I am not satisfied that this was the amount of the valuation, or, if it was, that it represented the true value of the furniture. It is said to have been made in March, 1922, and at that time and afterwards the defendant was willing to advance 400*l.*, an attitude which in my opinion is quite inconsistent with the view that the value was only 330*l.* I have come to the conclusion that the later part of his evidence was the more accurate, and that upon the valuation he was prepared to lend 400*l.* and subsequently reduced it to 300*l.* upon the allegation that some of the articles had been removed from the house after the valuation had been made—an allegation which was only sustained to the extent of a few pounds. Moreover the 400*l.* was to be advanced on the footing that the furniture should remain in the plaintiff's possession, and that she should execute a bill of sale in defendant's favour. The risks and disadvantages of this class of security are well known. According to Channell J. (1) the Bills of Sale Act, 1882, had the effect as soon as a few decisions had been given on it of raising the normal rate of interest on moneylenders' bills of sale from 30 to 60 per cent., and it is perhaps not to be wondered at that the defendant preferred if he could to have possession of the furniture instead of taking a bill of sale over it. The

(1) [1906] 1 K. B. 90.

plaintiff having consented to his request in this behalf the furniture was removed from her house and stored in his name at a repository in Folkestone, where it still is. The effect of all this was that by July 5, 1922, the plaintiff had stripped herself of the whole of the furniture and had handed it over to the defendant, who on his part had so far not bound himself to lend her a single pound, but had in fact obtained a far better security than was contemplated when he was entertaining an advance of 400*l*. When the plaintiff attended at the defendant's office on July 10 she expected to get 400*l*., and when she found she was only to have 300*l*., although she realized that she had been tricked, she was so harassed and so extremely in want of money that she had no alternative but to take the 300*l*. and give the promissory note and security. I have no doubt after hearing the evidence that she had been over-reached and tricked into this position, and before going to that meeting had placed herself entirely at the mercy of the defendant so far as the amount of the advance was concerned, as he intended and planned that she should do. I am always loath to interfere with contracts come to between persons of full age and understanding, but in this case I rejoice that the jurisdiction conferred upon me enables me to do what is just and right between these parties. I am satisfied that in this case there has been reprehensible conduct on the part of the moneylender and his associates; they have made an unconscionable bargain and ought never to have tricked this lady into the position in which she was placed; the moneylender has only himself to thank for this litigation. I propose to direct that the contract shall stand as a security for 300*l*. with interest at the rate of 15 per cent. from July 10, 1922, and the plaintiff must also pay the costs of the storage of the furniture and of the insurance. On these payments being made the defendant must deliver up the furniture to the plaintiff and assign to her the benefit of any subsisting policy of insurance. The plaintiff is entitled to redeem the furniture on these terms. Should she not do so the defendant is in like manner entitled to enforce his claim and to judgment for the 300*l*. and interest at 15 per

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cent. plus any expenses he may have incurred for storage and insurance. The defendant must pay the costs of the action, the plaintiff must pay those of the counterclaim, and there will be the usual set-off.

Solicitors: *F. C. Mathews & Co.; P. Haseldine & Co.*

G. M.

TOMLIN J 1923 *Nov.* 14.

In re GORDON'S SETTLEMENT.

HUNT *v.* MORTIMER.

[1923. G. 2051.]

Settlement—Stocks transferred by Settlor into Names of Trustees—Income payable to Wife of Settlor—Covenant by Settlor to pay Trustees Amount deducted as Income Tax in preceding Year—Trustees to pay Amount to Wife—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 103—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedule Rules*, *r.* 23, *sub-r.* 2.

By a deed of settlement, the settlor transferred certain stocks into the names of trustees upon trust to pay the income thereof to his wife during her life. By cl. 5 of the settlement, the settlor covenanted with the trustees that he would, at the expiration of every year, pay to them all such sums as might have been deducted in respect of income tax on payment of interest or dividends on the trust fund during the preceding year, the amount so received by the trustees from the settlor to be paid by them to his wife as income arising from the trust fund:—

Held, that inasmuch as the settlor was entitled to deduct income tax from the amounts he covenanted to pay to the trustees, and the wife suffered the deduction for a year, she never in fact received the income of the trust fund in full, and consequently the covenant in cl. 5 did not fall within the Income Tax Act, 1842, s. 103, or r. 23, sub-r. 2, of the All Schedules Rules of the Income Tax Act, 1918, and was, therefore, valid.

In re Peck's Settlement [1921] 2 Ch. 237 and *In re Gretton's Indenture* [1923] 1 Ch. 77 distinguished.

BY a settlement dated June 2, 1910, Charles Edward Grant Gordon (hereinafter called "the settlor") transferred certain stocks into the names of trustees upon trust to pay the income thereof to his wife Emma Gordon (now Emma Mortimer), during her life, but so that she should not have power to dispose thereof in the way of anticipation, and

from and after her decease to pay such income to the settlor during his life, and from and after the decease of both of them to stand possessed of the trust fund upon the trusts therein set forth. By cl. 5 the settlor covenanted with the trustees that he would, at the expiration of every year, pay to them all such sums as might have been deducted in respect of income tax on payment of interest or dividends on the trust fund during the preceding year, the amount so received by the trustees from the settlor to be paid by them to his wife as income arising from the trust fund. In 1916 the marriage of the settlor and his wife was dissolved, and she has since intermarried with Frank Percy Mortimer. The original trust fund produced a gross annual income of 400*l.*, but this amount had been slightly increased by reason of certain changes of investment. Income tax on the whole of the dividends on the investments comprised in the settlement was deducted at the source. The question raised by this summons was whether the payment by the trustees to Emma Mortimer of the moneys received from the settlor under cl. 5 of the settlement as income arising from the trust fund was void under the provisions of the Income Tax Acts.

Howard Wright for the trustees of the settlement.

Greene K.C. and *Vaisey* for Emma Mortimer. There is nothing in this agreement which brings it within the scope of s. 103 of the Income Tax Act, 1842, or r. 23, sub-r. 2, of the All Schedules Rules of the Income Tax Act, 1918. There is no contract here between the payer and the payee. The settlor contracts to pay the trustees certain sums, from which he can deduct income tax, and the trustees are to hand over such payments to Mrs. Mortimer. In effect she never receives "any interest rent or other annual payment in full without allowing such deduction." Income tax is in fact deducted from what she receives, and she only, after considerable delay, gets part of the tax remitted to her by the trustees. This case is quite unlike *In re Gretton's Indenture* (1), where

(1) [1923] 1 Ch. 77.

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there were the very factors which constitute a breach of the Income Tax Acts. The short judgment of Lord Loreburn in *Brooke* v. *Price* (1) is very apt. Here the machinery for collecting the tax is left intact; the trustees have to deduct the tax, and account to the revenue authorities. If the agreement in *Booth* v. *Booth* (2) did not contravene the Income Tax Acts, the agreement in this case cannot possibly be said to do so. Eve J. in *In re Peck's Settlement* (3) outlines an arrangement, such as the one come to here, which would probably be valid. *Burroughes* v. *Abbott* (4) was in regard to an order of the Divorce Court. This agreement is clearly a valid one.

Latter K.C. and *J. H. Bowe* for the settlor. This agreement is clearly void under the Income Tax Acts. This question was decided in *Readshaw* v. *Balders* (5), where it was held that a covenant by the grantor of an annuity not to pay property tax was void. The rule is not imposed merely for the benefit of the revenue. This was pointed out by Romer J. in *In re Gretton's Indenture.* (6) Where there is no contract between the parties the donor can give an annuity free of income tax, but where there is a contract such a covenant is absolutely void: see the judgment of Romilly M.R. in in *Floyer* v. *Bankes.* (7) In *In re Gretton's Indenture* (6) and *In re Peck's Settlement* (8) there were separate trusts. In *In re Gretton's Indenture* (6) there was a covenant to pay the tax by some one other than the person who was to pay the annuity. An agreement between a settlor and a beneficiary that the latter is to receive an annuity free of tax offends against r. 23, and is illegal. That is the basis of the judgments in *In re Gretton's Indenture* (6); *In re Peck's Settlement* (8) and *Burroughes* v. *Abbott.* (4) That the settlor agrees to pay back the deduction within twelve months makes no difference. The result of the covenant here is the same as in *In re Peck's Settlement.* (8) The trustees are merely

(1) [1917] A. C. 115, 123.
(2) [1922] 1 K. B. 66.
(3) [1921] 2 Ch. 237, 241.
(4) [1922] 1 Ch. 86.
(5) (1811) 4 Taunt. 57.
(6) [1923] 1 Ch. 77, 87.
(7) (1863) 32 L. J. (Ch.) 610, 613.
(8) [1921] 2 Ch. 237.

agents of the annuitant to pay the annuity to her. In all cases of this nature, the annuitant must suffer the deduction of income tax: *In re Cain's Settlement.* (1) Any agreement to pay any sum which another person has suffered by deduction of tax is void.

Greene K.C. in reply.

TOMLIN J. In this case I have to determine what is the effect of a covenant contained in a settlement, dated June 2, 1910, for payment of certain sums deducted in respect of income tax. Now the point is simply this, whether, having regard to s. 103 of the Income Tax Act, 1842, or to r. 23 of the All Schedules Rules of the Income Tax Act, 1918, which now replaces that section, the covenant in question is bad. Sect. 103 of the Act of 1842 was in these terms: [His Lordship read the section and continued:] The material part of that is reproduced in r. 23, sub-r. 2, of the All Schedules Rules of the Act of 1918 in these words: "Every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void"—"any such deduction" meaning the deduction referred to in sub-r. 1: "A person who refuses to allow a deduction of tax authorised by this Act to be made out of any payment, shall forfeit the sum of 50*l.*"

It is said that in this particular case the effect of this settlement is that there is an agreement for payment of the income of the settled fund to the wife in full, without allowing any deduction which can properly be made under the provisions of the Income Tax Acts, and in support of that view reliance has been placed on a number of cases to which I will refer in a moment. It is to be observed that under this settlement there is no obligation, direct or indirect, upon the husband to pay anything to the lady at all in respect of the income. He does not guarantee that the income which she receives shall be of any amount. He is under no personal liability in regard to it to her directly. The only liability which is imposed upon him is a liability to pay to the trustees

(1) [1919] 2 Ch. 364.

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at the expiration of every year all such sums as may have been deducted in respect of tax on account of the income of the fund during the preceding year. So far as the lady is concerned, she is bound to submit and does in fact submit to a deduction of tax in respect of the whole income of the fund. It is quite true that at the end of the year she may receive from the trustees further sums, arising from the discharge by the husband of his covenant under cl. 5, representing sums that have been deducted from her income in respect of tax. But upon the footing that cl. 5 is valid, and that the obligation of the husband thereunder is enforceable, it would seem to be plain that the husband has the right to deduct from any sums which he in fact pays under that covenant the appropriate amount for income tax, with the result that what the trustees receive and what the trustees pay to the lady never in fact amounts to the sums in respect of which she has in fact had to suffer deduction in regard to the income of the fund. So that in the sense in which the phrase is used in s. 103 and in r. 23 there has never been, and never can be under the machinery which I have described, any payment in full. The language of the section and the rule seems to me to indicate that the mischief which is sought to be met is the receipt by the payee of the total income without any deduction. It is said there have been decisions which must lead me to a conclusion that, reading this as a whole, it is an agreement for the payment of this income in full without allowing any deduction; and for the purpose of seeing whether that is the effect of those decisions I propose to say a word or two about them.

The first decision in order of date is *In re Peck's Settlement* (1), before Eve J. There a settlement was made, in pursuance of an order of the Divorce Division, by a husband of freehold property and stocks sufficient to produce an annuity of 175*l.* clear of income tax, and the trustees of the settlement were directed to pay this annuity to the plaintiff, who was the wife, clear of income tax, out of the net rents and profits of the settled property; and by a supplemental deed the

(1) [1921] 2 Ch. 237.

husband covenanted for himself and his executors to make good any deficiency in the annuity. The questions were first whether the original provision for the payment of the annuity clear of income tax was good or bad under s. 103, and secondly whether the covenant by the husband to make up any deficiency also was obnoxious to the section. It is to be observed that the provision in the settlement was that the trustees were directed out of the net rents and profits to pay the annual sum of 175*l.* clear of income tax, and, in the events which happened, the income from the property and funds which constituted the source from which the annuity was to come proved insufficient to provide for an annuity of 175*l.* clear of income tax. The obligation which was undertaken by the husband is expressed to be a covenant with the trustees that in case in any year the rents, profits and income should not be sufficient to provide the 175*l.*, he, his executors or administrators would pay to the trustees the amount of such deficiency, to be held by them upon the like trusts, and, until payment, such deficiency should be charged upon the corpus of the funds. It is to be noted that under that provision the husband was liable for the whole annuity; that is to say, if there had been a failure in respect of the annuity he was liable to make good the whole. In those circumstances Eve J. held that the provision whereby the annuity was expressed to be an annuity clear of income tax was bad so far as it was expressed to be clear of income tax; and that would seem to be a conclusion which the learned judge necessarily arrived at, having regard to the authorities.

Now what was the obligation of the husband under the covenant to make good any deficiency? All the learned judge says is this (1): "The covenant on the part of the husband to make good any deficiency is of the same nature and, so far as it relates to the tax, cannot be enforced." Now I think it is reasonably plain what was the view taken of that covenant. It is clear that if the original annuity had been expressed to be an annuity of 175*l.* without any reference

(1) [1921] 2 Ch. 242.

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to tax, the trustees or other persons paying that annuity would be entitled to deduct income tax from any instalment of the annuity which they paid; and if the fund proved insufficient to provide the annuity in full, the guarantor (if I may use that expression to indicate the position of the husband, although I do not suggest it is necessarily quite an accurate expression) would be entitled in respect of any payments he made under his covenant to deduct the appropriate amount of income tax.

The effect of his contract, however, was, that any payment that he had to make under his obligation for implementing the annuity, had to be made without deducting tax, because the obligation was to make good any deficiency in an annuity which was expressed to be free of tax. So that the contract necessarily failed, to the extent that it covered income tax, the moment the conclusion was reached that the provision in relation to the annuity was in itself bad in regard to income tax. If that is a true explanation and understanding of *In re Peck's Settlement* (1), I do not think the decision in that case really affords me any assistance in coming to a conclusion in this case.

Reference was made also to *Burroughes* v. *Abbott* (2), before P. O. Lawrence J., but that was, I think, only for the purpose of indicating the general principle upon which the Court has to act in determining whether or not an annuity expressed to be free of income tax is in that regard a good or a bad provision, and I do not think it affords assistance in coming to a conclusion upon the particular question with which I am dealing.

The third case is *In re Gretton's Indenture* (3), before Romer J. There the facts were shortly these, that under a will there was an annuitant who was entitled to her annuity free of income tax, and for some reason it became desirable to make something in the nature of a family arrangement between the parties who were interested under that will, and an agreement was come to under which the annuitant was to receive an annuity of a lesser amount than that given

(1) [1921] 2 Ch. 237. (2) [1922] 1 Ch. 86.
(3) [1923] 1 Ch. 77.

to her by the will, and that annuity was expressed to be in lieu and satisfaction of the annuity of 6000*l.* given to her by the will; and the persons who were interested in the estate, subject to the annuity, agreed to indemnify the annuitant against all tax, legacy and other duties which may be, or become, payable by the annuitant in reference to the annuity, and the same persons charged all their shares and interests in the estate with the amount of the taxes and duties in respect of which the indemnity was given. The questions were, first, whether the annuity which the annuitant took under the agreement was an annuity free of tax as being in fact the annuity under the will but reduced in amount; and, secondly, what was the effect of the contract by the persons interested in the estate to indemnify the annuitant against any tax which might be deducted. It was suggested that the annuity was still the annuity payable under the will, and it was further suggested that it was an annuity payable out of a tax-free fund. Both those suggestions failed of adoption, and the learned judge held in fact that the annuity must be treated as an annuity under the agreement, and was subject to deduction for tax. When he came to deal with the question as to the effect of the provision by the persons interested in the estate to indemnify the annuitant against tax, all he says is this (1): "It was admitted on behalf of Lady Byron that if she be not entitled to have the annuity of 5000*l.* paid without deduction, the covenant indemnifying her against all tax is invalid and unenforceable: see *In re Peck's Settlement.* (2)" One thing is obvious, that the question whether the effect of the covenant to indemnify was good or bad was not a question to which the learned judge ever had to direct his mind. Rightly or wrongly, counsel for the parties in the case accepted the position there that the provision was a bad provision, and the matter was not argued or judicially determined. So that it cannot be said that that case affords me any guidance for the purposes of this case. But I think it is well to indicate that in that case there was given by the persons who undertook the burden

(1) [1923] 1 Ch. 90. (2) [1921] 2 Ch. 237.

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of the indemnity a direct charge upon their own interests in the estate of the whole annuity, and in one sense they were very truly the persons who were liable to pay the annuity, and it is, I apprehend, reasonably plain that if there had been an action by the annuitant to enforce that charge against the property of those who had covenanted to make good the amount of the duty, in taking the account in that action they would not have been entitled to treat the annuity as something from which they could have deducted the amount of the tax for the purpose of ascertaining how much was due to the plaintiff in the action. If that is a fair and accurate statement of the position in that case, it seems to me that it may very well have been that the obligation there was an invalid obligation, because it was part of a general bargain under which those who were liable, through their property, for payment of the annuity entered into an agreement for payment in full without allowing any deduction for tax. Whether that be true or not the case does not, it seems to me, afford me any guidance here.

I am therefore left to the light of nature in coming to a conclusion on this particular case, and the conclusion at which I have arrived is that in determining whether or not any particular provision of this kind is bad, those who allege that it is bad must bring it strictly within the words of the statutory provision to which it is alleged to be obnoxious. It seems to me that such a clause as s. 103 of the earlier Act and r. 23 of the present Act is a provision which must be construed strictly, because it is very much of the same character as a forfeiture clause or penal provision. It invalidates something which otherwise would be valid, and I think the onus (if one may use that phrase in regard to what is more or less a question of construction) is upon those who allege that a provision is bad to bring it strictly within the terms of the section. It seems to me that in order to do that they have to establish that there is in fact an agreement for payment in full without deduction, and I am disposed to think that in order to do that the essential thing to show is that there is an agreement by the person who, either

personally or through his property, is liable to pay the income, that the person to whom the income is payable shall be entitled to be paid without deduction and shall be entitled to resist the deduction if sought to be made, and that where there is a person entitled to income payable out of a specific fund or payable by a particular individual, it cannot be said that a collateral independent obligation by some other party to make some payment to the recipient of the income ascertained by reference to the amount of the income tax deducted —a deduction which it is necessary for the recipient of the income to suffer—is necessarily bad at all.

In this particular case the husband is under no liability for the annuity. The annuity is payable out of funds which, it is true, were provided in the first instance by him, but which are settled in such a way that he has no control over them at all. He is under no personal liability to pay the annuity; the annuity is not payable out of that which is now his property at all; and the fact that he sees fit to enter into an obligation to make some further payment does not, I think, result in there being an agreement under which payment in full without any deduction can be insisted upon by the annuitant or recipient of the income. But not only that, it seems to me that the section and rule contemplate an agreement which on its true construction, if it were valid, would entitle the recipient of the income to receive the whole of the gross amount of the income in question without any deduction, and it is not directed to the case where there is some collateral provision under which there is payable a sum ascertained by reference to the amount of income tax deducted from the income but itself subject to tax, so that the recipient of the income is not in the same position as she would have been if the income had been payable without deduction of tax. It is to be observed that in this particular case the clause does not provide for the trustees not deducting the income tax. On the contrary, it proceeds upon the principle that income tax has in fact been deducted and dealt with in the proper way, and that when all that has been done at the end of the year there will be paid by the husband

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to the trustees a sum which corresponds to the sums which have in the preceding year been deducted. It is plain, therefore, that so far as the recipient of the income is concerned, she never stands in the same position as one from whose income there has never been any deduction at all. The deduction is in fact suffered by her. She is out of pocket for some time in respect of it, and when she does get a payment as the result of the clause in question, it never is or can be, in my view, a payment equal in amount to that which has been deducted from her income.

For all these reasons I have come to the conclusion that on the true construction of this document there is no such agreement for payment of interest, rent or other annual payment in full without allowing deduction of tax as is contemplated either by s. 103 of the Act of 1842 or by r. 23 of the All Schedules Rules of the Act of 1918.

Solicitors : *Emmet & Co.; Nye, Moreton & Clowes, for J. K. Nye & Donne, Brighton.*

P. J. B.

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[1866. P. 31.]

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Conversion into Personalty—Reconversion into Realty—Will—Devise in strict Settlement—Compromise of Litigation involving Sale of Real Estate—Order of Court confirming Compromise—Surplus Proceeds to "follow limitations of Real Estate"—Executed or Executory Compromise—Realty or Personalty.

A testator, who died in 1864, devised his real estate to his eldest son C. R. P., and E. C. P. the second son of C. R. P., successively for life with divers remainders over in strict settlement. In 1866, actions were commenced, one to administer his estate and two others by incumbrancers upon estates settled by the testator in favour of himself for life with remainder to C. R. P. in fee simple ; but in 1867, an arrangement was come to between the parties interested whereby the actions were settled upon terms that the real and personal estates of the testator and the said real estate of C. R. P. should be sold, that out of the proceeds of sale provision should be made for incumbrances, debts, and certain jointures and legacies and, as to the residue, that one-fifth thereof

should "follow the limitations contained in the testator's will with respect to his real estate." The arrangement provided that it should be confirmed by the Court and the necessary powers obtained therefrom for carrying the same into effect. By an order of the Court made in 1868, after reciting that the arrangement was a proper one and for the benefit of the parties interested, including creditors, it was ordered that the same should be carried into effect, and that (inter alia) the real and personal estate of the testator and the real estate of C. R. P. should be sold and the proceeds paid into Court, and that all further proceedings in the actions should be stayed, except for the purpose of carrying the arrangement into effect, with liberty for any of the parties interested to apply. In pursuance of another order made in 1870, one-fifth of the residue of the fund in Court representing the proceeds of sale of the said estates, after making provision for the purposes aforesaid, was carried to an account of "the fund which under the arrangement of 1867, is to follow the limitations contained in the will of the testator with respect to his real estate."

Upon the death, in 1922, of E. C. P., the surviving tenant for life, the tenant in tail then entitled in possession consequent upon the determination or failure of the preceding limitations, presented a petition for payment to him of the fund in Court representing that one-fifth, which raised the question whether the fund descended as realty to the petitioner, who, if the real estate of the testator had not been sold, would under the limitations of his will and in the events which happened, have been entitled thereto as tenant in tail in possession, or whether that real estate was converted by the order into personalty and therefore vested absolutely in the first tenant in tail by purchase, who had long predeceased the tenant for life:—

Held, by P. O. Lawrence J. and affirmed by the Court of Appeal, (1.) that the order of the Court confirming the arrangement, having been properly made, effected a conversion of the testator's settled real estate into personalty from the date thereof; (2.) that in sanctioning the arrangement the Court intended that effect should be given to it strictly, according to the express terms agreed upon and no others; and that, accordingly, the arrangement was an executed and not an executory settlement of the actions; (3.) that the term of the arrangement that one-fifth of the fund should follow the limitations of the real estate—of the legal effect of which words knowledge was to be imputed to the parties to the arrangement—was ineffectual to prevent the fund from vesting absolutely in the first tenant in tail by purchase, and did not warrant an implication in the order of 1868, of a direction to reinvest in realty, nor warrant the Court in moulding the trusts as in *In re Beresford-Hope* [1917] 1 Ch. 287, so as to correspond as near as possible with the limitations in the will and to provide against the fund vesting absolutely in the first tenant in tail by purchase. It was, accordingly, declared that such tenant in tail was entitled to the fund.

PETITION.

Charles Van Notten Pole by his will, dated December 31, 1862, devised all his manors, lands and hereditaments to the

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use of his eldest son Charles Richard Pole for life with remainder to the use of Edward Clitherow Van Notten Pole, the second son of Charles Richard Pole, for life, with divers legal limitations in remainder. Under those limitations and in the events which happened, the first tenants in tail by purchase were two granddaughters of Charles Richard Pole —namely, Anna Matilda Pole and Millicent Felizarda Pole, who became entitled as tenants in common in tail. They both attained the age of twenty-one years, and died without having been married and without having executed any disentailing assurance.

Anna M. Pole, who survived her sister and was the sole executrix who proved her sister's will, by her own will appointed executors who were respondents to this petition.

The testator died on September 8, 1864, and on August 10, 1879, Charles Richard Pole died. Edward Clitherow Van Notten Pole lived to a great age and died on April 6, 1922. At that date, owing to the determination or failure of all the limitations in remainder immediately preceding the limitation in favour of the petitioner's mother and in the events which happened, the petitioner Henry Arthur Pole Soppitt was, by descent from his mother (who died without having executed a disentailing assurance), entitled, as tenant in tail in possession, to the testator's settled real estate.

In 1866, an action was commenced for the administration of the real and personal estates of the testator, and two other actions were also commenced by incumbrancers on certain estates which the testator had in his lifetime settled upon himself for life with remainder to his son Charles Richard Pole in fee simple.

On June 23, 1866, a decree was made in the first action for the execution of the trusts of the testator's will and the usual accounts and inquiries were directed. In the course of the administration claims were made against the estate in respect of the firm of Peter and Charles Van Notten & Co., of which the testator was for many years a partner, and claims were made by other creditors: and ultimately, it appearing that the estate was insufficient to satisfy all the claims upon

it, the several actions were compromised upon terms arranged between the parties interested and embodied in an informal document dated November 16, 1867.

The arrangement provided for, amongst other things, the sale and realization of the real and personal estate of the testator and of the real estate of Charles Richard Pole, and that out of the proceeds a sufficient sum should be set apart to pay certain incumbrances and debts (a list of which followed) and to provide for certain jointures and legacies, and that the residue, after payment of the costs, charges and expenses of all parties, should be paid as follows: "one-fifth to follow the limitations contained in the will of Charles Pole with respect to his real estate," and four-fifths to be divided amongst the persons therein named rateably in proportion to the amounts due to them at the date of the stoppage of the firm. The arrangement further provided that, until conversion, the income of the real and personal estate of the testator and the real estate of Charles Richard Pole should, after payment of interest on incumbrances and jointures, be divided among the persons who under the arrangement would share the surplus proceeds on such conversion; that the arrangement should be confirmed by the Court and the necessary powers be obtained from the Court for carrying the arrangement into effect.

By an order dated April 25, 1868, made in the said actions, after reciting that the Court was of opinion that the agreement of November 16, 1867, for the compromise of the matters in question in the actions was a fit and proper compromise and for the benefit of the parties interested in and the creditors upon the estate of the testator and Charles Richard Pole and also upon the estates of Lambert Van Notten Pole and the said firm, it was ordered that the same should be carried into effect, and that the testator's outstanding personal estate should be got in and the proceeds paid into the bank to the credit of the action *Pole* v. *Pole* [1866 P. 31] to an account to be intituled "Personal Estate Capital Account." And it was further ordered that the settled estates—namely, the estates of Charles Richard Pole and the estates devised by the

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testator's will should be sold with the approbation of the judge, and that the proceeds of such sale should be paid to the credit of the said actions to an account to be intituled "Real Estate Account," and that all further proceedings in the said actions should be stayed, except such as might be necessary for carrying the compromise into effect, and for that purpose any of the parties were to be at liberty to apply.

In pursuance of that order divers sales of parts of the estates in the order specified were from time to time made, and the proceeds thereof were paid into Court as directed by the said order; and in pursuance of an order made in the said actions on November 18, 1870, the residue of the fund in Court to the credit of the real estate account remaining, after certain portions of such fund had been carried over to separate accounts to provide for the jointures and other incumbrances, was distributed in accordance with the arrangement, that was to say: one-fifth part thereof was carried over to the credit of the actions *Pole* v. *Pole* and *Mundy Pole* v. *Pole* to the separate account of "The fund which under the arrangement of November 16, 1867, is to follow the limitations contained in the will of Charles Van Notten Pole with respect to his real estate, subject to duty," and the remaining four-fifths were divided in accordance with the provisions in that behalf contained in the arrangement.

Pursuant to divers orders from time to time made in the said actions the remaining assets forming part of the testator's estate were, as and when they became available, from time to time divided between the persons entitled to the surplus or residue of the testator's estate under the arrangement, one-fifth being in every case transferred or carried over to the credit of the account last mentioned.

Upon this petition for payment out of the fund in Court standing to the credit of that account, which consisted of 480*l.* 17*s.* cash and 25,645*l.* 19*s.* Consols, as to which it was not possible to determine how much thereof consisted of proceeds of sale of the real estates of the testator and his son Charles Richard Pole and how much of the personal estate of the testator, the question arose whether the funds in Court

descended as realty to the petitioner as tenant in tail in possession on the death of the tenant for life, or whether they vested absolutely in the first tenant in tail by purchase who attained the age of twenty-one years.

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The petition came on for hearing before P. O. Lawrence J. on July 20, 1923.

Jenkins K.C. and *R. W. Turnbull* for the petitioner. First, the surplus proceeds of sale of the testator's real estate were from the first impressed with the character of realty and never lost that character. The arrangement of 1867, to which the first tenants in tail by purchase were parties and therefore bound thereby, did not operate to convert into personalty those surplus proceeds which were not required for purposes of administration, with the result that on the death of the tenant for life in 1922, the funds in Court vested as realty in the petitioner as the first tenant in tail entitled in possession: *Cooke* v. *Dealey*. (1) The arrangement could not bind persons interested as tenants in tail in remainder who were not parties to it; it could only bind those who were parties to it, who had no power by entering into the arrangement to effect a conversion into personalty so as to deprive tenants in tail in remainder of their interests under the will. The provision in the arrangement that the funds should follow the limitations contained in the will with respect to the testator's real estate amounted to a declaration that the funds were to devolve as realty upon the real estate limitations. The persons interested under those limitations are entitled to have the proceeds reinvested in land: *In re Stewart*. (2)

Secondly, if the effect of the arrangement and the order was to convert the proceeds of the testator's real estate into personalty, there was an effective reconversion into realty. The arrangement was not an executed settlement, but was only an executory settlement of the questions involved in the actions. It was intended, at the time when the arrangement was made, that under the liberty to apply reserved by

(1) (1855) 22 Beav. 196. (2) (1852) 1 Sm. & Giff. 32.

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the order, the Court should have power to settle the ways and means by which the plain language of the provision that the fund should follow the limitations of the real estate should best be carried into effect, so as to secure the interests of the persons entitled in remainder on the death of the survivor of the first two tenants for life. An equity arose in favour of the petitioner as the heir at law, which entitled him to say that those proceeds, so far as they were not required for purposes of administration, ought to be treated not as personalty but as reconverted into realty. The arrangement of 1867 and the order involved an imperative trust for reconversion into realty. True it is that a mere declaration that personal estate shall devolve as realty is inoperative for the purpose intended, but in this case the arrangement and the terms of the order confirming it, coupled with the liberty to apply for the purpose of carrying it into effect, show the intention of the parties that the terms of the arrangement were of an executory nature and sufficient to create an imperative trust for reconversion into realty: *In re Walker*. (1) That intention can be carried into effect and the original rights of the heir at law protected on the footing as if the order had contained a direction for the reinvestment of the proceeds in the purchase of realty: *Fellow* v. *Jermyn*. (2) Or, it can be carried out in equity by the Court, on the principle of an executory trust having been created, so as to carry out the intention of the testator, by moulding the trusts so as to secure that no tenant in tail should take the funds absolutely, but that they should go to the same persons as would have been entitled to the real estate from the sale of which the funds were derived.

Owen Thompson K.C. and *W. A. Peck* for the legal personal representatives of Anna M. Pole and Millicent F. Pole. The order of April 25, 1868, having been rightly made effected a conversion of the land sold into personalty, with the result that the funds in Court vested absolutely in the first tenants in tail by purchase: *Burgess* v. *Booth*. (3)

(1) [1908] 2 Ch. 705. (2) [1877] W. N. 95.
(3) [1908] 2 Ch. 648.

The decision in *Cooke* v. *Dealey* (1) was an attempt to extend the principle of *Ackroyd* v. *Smithson* (2) beyond its proper limits: see dictum of Jessel M.R. in *Steed* v. *Preece* (3) since approved of by the Court of Appeal in *Burgess* v. *Booth*. (4) The funds in Court representing the surplus proceeds of sale of the settled real estate of the testator are personalty, and there is no provision in the arrangement of 1867 for their reconversion into realty: *In re Grange*. (5) The parties to the arrangement attempted to make personalty follow the limitations of and devolve as real estate without the creation of an imperative trust. That attempt was ineffectual, since it is plain that the arrangement created no trust for reconversion into realty. The only means by which reconversion may be brought about is by an imperative trust to reconvert into realty: *In re Walker*. (6) The principle of that decision was followed in *In re Aspinall's Settled Estates* (7), where a declaration that a fund should be held as capital moneys under the Settled Land Acts was not enough to impress it with the character of real estate, in the absence of an imperative duty to reinvest in land; and it was also followed in *In re Sturt* (8), where Peterson J. held that a testator cannot convert personalty into realty by merely declaring that it is to devolve as realty: see also *Portman* v. *Viscount Portman*. (9)

C. P. Sanger for the executors of the testator.

Cur. adv. vult.

1923. July 26. P. O. LAWRENCE J. [after stating the facts as above set forth, concerning which he said there was no dispute, continued:] The question now arises whether the fund in Court to the credit of the separate account which I have mentioned belongs to the person who, on the death of Edward Clitherow Van Notten Pole, would have become

(1) 22 Beav. 196.
(2) (1780) 1 Bro. C. C. 503; 1 W. & T. L. C., 8th ed., 394.
(3) (1874) L. R. 18 Eq. 192.
(4) [1908] 2 Ch. 648.
(5) [1907] 2 Ch. 20.
(6) [1908] 2 Ch. 705.
(7) [1916] 1 Ch. 15.
(8) [1922] 1 Ch. 416.
(9) [1922] 2 A. C. 473.

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entitled to the real estate of Charles Van Notten Pole, the testator, as tenant in tail in possession, or whether the fund vested absolutely in the first tenant in tail by purchase under the limitations of the will, although such tenant in tail did not become entitled in possession. The petitioner Henry Arthur Pole Soppitt claims to be the person who, if the real estate had not been sold, would, under the limitations of the will of the testator, be at the present time the tenant in tail entitled in possession to such real estate.

The petitioner bases his claim to the fund on one or other of the following grounds: in the first place, on the ground that the proceeds of sale of the real estate never lost their character of realty and therefore that they descended as real estate; in the second place, on the ground that the petitioner is now entitled to an order directing the arrangement of 1867 to be carried into effect in such a manner, as if the order sanctioning the arrangement had contained a direction that the proceeds should be reinvested in real estate to be limited to the uses contained in the will; and in the third place, on the ground that the petitioner is entitled to have the trusts of the proceeds of sale now declared and moulded by the Court, so as to stand in the form adopted in *In re Beresford-Hope* (1), with the result that such proceeds would not vest absolutely in any person being a tenant in tail by purchase who has died or dies under the age of twenty-one years, or in any person being tenant in tail by purchase who has died or dies before the expiration of twenty-one years from the determination of all estates for life preceding his estate in tail male or in tail without, in either of the two cases, having with the consent of the protector of the settlement, if any, either barred the entail in all the settled real estate, or declared by deed that the funds shall vest in him absolutely.

I can deal quite shortly with the first point made by the petitioner, because Mr. Jenkins, at a later stage of his argument, frankly stated that he did not really rely so much upon that point as upon the others. This point, as I understand

(1) [1917] 1 Ch. 287.

it, was based on the decision of *Cooke* v. *Dealey* (1), where it was held that, real estate devised to A. having been sold in an administration suit to which the devisee was a party for the purpose of the payment of debts, the surplus proceeds remaining in Court on the death of the devisee were of the character of real estate and passed to the heir of the devisee. That decision was questioned by Sir George Jessel M.R. in *Steed* v. *Preece* (2), and having regard to this case and to the subsequent cases which have followed it, and especially to *Burgess* v. *Booth* (3), I think the decision in *Cooke* v. *Dealey* (1) cannot be relied upon as an authority for the proposition advanced on behalf of the petitioner. In my judgment, so far as this Court is concerned, the point is covered by the decision in *Burgess* v. *Booth* (3), where it was held that since the decision in *Steed* v. *Preece* (2) it had been established that an order of the Court rightly made for the sale of real estate operates as a conversion from the date of the order, so that the proceeds become personalty. In my opinion it is now well settled that in the absence of any statutory provision to the contrary, such as is to be found in the Partition Acts, an order of the Court properly made for the sale of real estate operates as a conversion from the date of the order. I therefore hold that the real estates of the testator and of Charles Richard Pole were converted into personalty as from the date of the order of April 25, 1868, when they were directed to be sold. I may observe, however, that the petitioner's first point does not touch so much of the fund as consisted of personal estate of the testator, and it is admittedly impossible now to determine how much of the fund consisted of proceeds of sale of the real estates of the testator and of his son Charles Richard Pole and how much consisted of personal estate of the testator. In view of my decision, however, it is unnecessary to say anything more upon this point.

The next point is one which requires careful consideration. Mr. Jenkins has argued that, in this case, the Court ought to divide the fund as if an order had been made for the

(1) 22 Beav. 196. (2) L. R. 18 Eq. 192, 197.
(3) [1908] 2 Ch. 648.

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reinvestment of so much of the fund as consisted of the proceeds of sale of the real estates and for the investment of so much of the fund as consisted originally of personal estate in the purchase of real estate to be settled to the uses contained in the will of the testator. He has called my attention to the case of *Fellow* v. *Jermyn* (1), where Sir George Jessel M.R. held that certain proceeds of sale of real estate must be treated as real estate: from the facts of that case it appears that certain real estate was sold for the purpose of satisfying incumbrances, but the decree directing the sale also directed that, in case more should be raised by the sale than would be sufficient to satisfy the incumbrances, then the surplus should be laid out in land to be settled to the same uses to which the estate was devised. As I conceive, that case hinged upon the fact that there was in the order directing the sale a direction that the surplus proceeds should be laid out in the purchase of real estate. The question in the present case, however, is whether the Court in the absence of any such direction in the order for sale is at liberty, at the present time, to supply that omission and to make an order retrospectively directing the proceeds of sale to be invested in the purchase of land to be settled to the uses of the will of the testator. If the Court is justified in doing that, then, I think, Mr. Jenkins' contention would be right. The form of investment of course need not be gone through, but the proceeds would then, in accordance with the decision in *Fellow* v. *Jermyn* (1), be treated as having all along been invested in land, and would be divisible accordingly. Mr. Jenkins has forcibly urged that the arrangement of 1867 was not an executed settlement, but was a provisional agreement made by the parties who were not the complete owners of the subject matter of their compromise, that it was made subject to the sanction of the Court, and that it was, therefore, in its inception, of an executory nature; further, that when the Court had that arrangement before it for its sanction, the Court, in purporting to bind all parties interested in the estate, would never have done so with a view of excluding

(1) [1877] W. N. 95.

those persons who were entitled as tenants in tail in remainder in favour of the first tenant in tail by purchase. The answer to these contentions, in my judgment, is that the arrangement was intended by the parties to be one which the Court should sanction according to its terms. It is true that the parties to it were not all the parties who were interested in the properties dealt with, but it was intended by those parties that the other persons interested should be bound by the decree of the Court directing it to be carried into effect. In my judgment, the moment that the Court sanctioned the agreement and directed it to be carried into effect, it became, within the meaning of the authorities, an executed agreement and was no longer executory; that is to say, in so far as the arrangement contained provisions for the sale of real estate and for dealing with the proceeds of sale, the Court, when sanctioning the arrangement, intended that it should be carried out according to its terms, with the result that it is necessary to ascertain what the true meaning of the original arrangement is. At this distance of time the Court can only judge of the meaning of the arrangement by what the arrangement expresses, and cannot now probe into what the parties may have really intended, and attempt to reform or remould the arrangement in accordance with that intention. Great reliance has been placed by Mr. Jenkins on the libertv, reserved in the order sanctioning the arrangement, for the purpose of carrying it into effect. In my judgment that liberty was reserved solely for the purpose of enforcing the arrangement according to its terms and not otherwise. So far as was then possible, the arrangement was ordered to be carried into effect, not merely in general terms, but by giving the special directions that the personal estate should be got in and that the real estate should be sold. That the terms of the arrangement seriously affected the then existing limitations of the real estate, and entirely altered its destination, cannot be doubted. The whole of the real estate was ordered to be sold, and four-fifths of the proceeds were paid out to persons who were entire strangers; only one-fifth was directed to follow the limitations of the

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will. It is a sound principle that persons are presumed to know the law of this country; although in practice no doubt it often is difficult for them to attain that knowledge: still, on that principle, the parties must be assumed to have known that, when they directed one-fifth of the proceeds of this real estate to follow the limitations of the will of the testator, the result would be that those proceeds, being personalty, would vest absolutely in the first tenant in tail by purchase. It may be that the parties did not intend any such result to follow; but having expressed what they presumably intended, and the Court having sanctioned the arrangement as expressed, I think it is now too late to attempt to remould the trusts declared concerning the one-fifth of the proceeds of the real estate. As I understand the law, an executory trust is a trust which leaves something to be supplied; in other words, it is a trust which is not completely expressed by the parties, and one which the Court or the trustees must mould or supplement in order to carry out the intention.

In view of the cases which have been cited, I think it right that I should state that, in my opinion, there is an essential distinction between declaring trusts by reference to existing trusts and declaring a trust of personal estate to be held upon trusts which, as near as possible, will correspond with the trusts declared concerning property of a different character, such as real estate. In the former case I am of opinion that the trust is an executed trust; that is to say, there is nothing left to mould and there are no terms which require to be supplied. In the latter case, it has been held that the trust is an executory one, because, ex hypothesi, the trusts will not be the trusts to which reference is made; the trusts have to be moulded so as to carry out, as nearly as may be, the intention of the settlor, that they should, so far as possible, be in accordance with the trusts declared of a property which is of a different character. Such was the case of *In re Beresford-Hope*. (1) The decision in that case was founded upon a very similar case of *Miles* v. *Harford*. (2) In the present case Mr. Jenkins asked the Court to do what I

(1) [1917] 1 Ch. 287. (2) (1879) 12 Ch. D. 691.

consider would be entirely to reform or remould the trusts of the one-fifth of the proceeds of sale of the real estate. He contended that if the Court is to carry into effect the arrangement of 1867, according to its literal wording, it can only do so by directing that one-fifth of the proceeds should be reinvested in land, and that the Court is not only justified in doing that, but ought to do that, in order to carry out the intention of the parties. If the arrangement is examined, there is nothing to suggest that any part of the proceeds were intended to be reinvested in land. As to four-fifths, they were to be immediately distributed; as to one-fifth, the parties agreed and the Court declared that the money was to follow the limitations contained in the will concerning the real estate, which seems to me to imply the contrary, that is to say, that it was not to be reinvested in land to be settled to the uses of the will, but that the money itself was to follow those limitations. If our law had permitted that to be done, exactly the same result would have followed as if the money had been reinvested in land to be settled to the same uses. But it is well settled that an agreement that money shall be settled upon the limitations of real estate in strict settlement cannot be completely effective, but will operate to vest the money absolutely as personalty in the first tenant in tail by purchase. I can only read this arrangement of 1867 as, in effect, directing that one-fifth of the proceeds of sale should be held upon the limitations contained in the will of the testator. Therefore, as far as regards the second point made by the petitioner, I have come to the conclusion that there is nothing in the arrangement which would warrant the Court now holding that there ought to have been a direction given by the Court to invest this money in land in order to carry out the arrangement.

The last point made on behalf of the petitioner is one which is covered to a great extent by what I have already said. It is contended that, even if there is no direction to reinvest in land, yet there is to be found in this arrangement an executory settlement which ought to be carried out on the lines on which Eve J. directed the proceeds of sale to be

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settled in *In re Beresford-Hope.* (1) That point, again, depends on whether there is anything executory in the arrangement of 1867, as to the division of the proceeds of sale. I have already expressed my view that there is nothing executory in the terms of this document so far as relates to the destination of one-fifth of the proceeds, and that when the arrangement was sanctioned by the Court, so as to be binding on all parties, the agreement became executed to this extent, that it fixed the destination of the one-fifth part of the proceeds of sale and that there is nothing left here to mould or to fill in: that being so, I ought not in this case to apply the reasoning which induced Eve J. in *In re Beresford-Hope* (1) to direct a settlement so as to make the proceeds go as nearly as possible, and as near as the different characters of the properties would permit in accordance with the limitations contained in the will of the testator with respect to his real estate. For these reasons I have come to the conclusion that the original order of 1868 operated as a conversion, that the arrangement of 1867 provided that one-fifth of the residue of the proceeds of sale should follow the limitations contained in the will of the testator, with the effect that the fund which is now in Court became long since vested in the first tenant in tail by purchase under the limitations contained in that will; and I propose to make a declaration to that effect and to direct, on the footing of that declaration, an inquiry who, in the events which have happened, is now entitled to the fund in Court.

H. C. H.

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The petitioner appealed. The appeal was heard on November 13 and 14, 1923.

Jenkins K.C. and *R. W. Turnbull* for the appellant. It is admitted that the order directing the sale of the portions of real estate in question having been properly made effected a conversion thereof into personalty: *Burgess* v. *Booth* (2); but we submit that the agreement of compromise was in its nature executory, and the question is how is the provision

(1) [1917] 1 Ch. 287. (2) [1908] 2 Ch. 648.

that the one-fifth of the composite fund should follow the limitations of the testator's real estate to be carried into effect. The Court ought to treat the order sanctioning the compromise as an interim order which left all questions open as to carrying it into effect so as to safeguard the interests of persons entitled in remainder after the death of the survivor of the first two tenants for life, the intention being that the personalty should follow the limitations of the real estate. It was manifestly overlooked at the time that unless certain ancillary provisions and directions were inserted in the order the result would be that that intention would be defeated. Under these circumstances the Court ought now to remould the provisions of the arrangement so as to carry out the intention of the parties by inserting directions for the reinvestment of the fund in the purchase of land to be settled to the uses of the testator's will, or in some other way to secure that no tenant in tail should take the fund absolutely.

[*Phillips* v. *James* (1) was also referred to.]

Owen Thompson K.C. and *W. A. Peck* for the respondents were not called upon.

C. P. Sanger for the executors of the testator.

POLLOCK M.R. This is an appeal from a judgment and order of P. O. Lawrence J. upon a petition presented by the appellant. The facts are shortly as follows: Charles Van Notten Pole, the testator, died on September 8, 1864, and when he died his personal affairs and those of the partnership in which he had been engaged, and those of his son and partner Charles Richard Pole, were in considerable disorder. In order to solve the difficulties which had arisen an agreement was entered into on November 16, 1867, by the parties who were represented and who had varying and different interests in the estate and property which had to be regulated at that time. Incidentally as part of that scheme it was provided that certain portions of real and personal estate should be sold; it was directed that certain real and personal property

(1) (1865) 3 D. J. & S. 72.

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of the testator and of the son, Charles Richard Pole, should be sold, and the property so realized was to be dealt with in a certain way. A certain portion of it was to be applied in making payments necessary at that time, but as to one-fifth of the ultimate balance of this composite fund it was provided by the agreement that it was to follow the limitations contained in the will of the testator with respect to his real estate; and finally this arrangement, as it is called, was to be "confirmed by the Court of Chancery upon a petition presented in the suits of *Pole* v. *Pole*, *Mundy* v. *Pole* and *Martin* v. *Pole*, and that the necessary powers be obtained from the Court for carrying the arrangement into effect." It is almost unnecessary to state that the one-fifth of the assets realized from the sale of the realty of the testator and of his son remained personalty, and there was no trust for reinvestment of any portion of it in real estate. Following the decision in *Burgess* v. *Booth* (1), it stands perfectly clear from the date of the decision in *Steed* v. *Preece* (2) that it is "established that an order of the Court rightfully made for the sale of real estate operates as a conversion from the date of the order so that the proceeds of the sale are personalty." And inasmuch as no provision was made under the agreement and the order that I will refer to in a moment that there should be any reinvestment in realty, one-fifth of the ultimate balance remained personalty. It is also clear that the provision that one-fifth is to follow the limitations contained in the will of Charles Pole with respect to real estate, can only be operative within a limited degree. Down to the time when you get an estate of inheritance, down to the first tenant in tail by purchase, so far, and no further, can the personalty follow the limitations with respect to real estate unless further and particular provisions are made that it should do so.

Now that agreement came before the Court on April 25, 1868, upon a petition for confirmation, and Stuart V.-C. made an order upon it in common form. [The Master of the Rolls referred to the terms of the order as set out above, and

(1) [1908] 2 Ch. 648. (2) L. R. 18 Eq. 192.

continued :] It is said that that order was made upon a mere agreement, that the Court was not dealing with a settlement or will or with an express trust ; it was dealing simply with an executory agreement. Be it so. Here the order was made in the common form, without any amplifications, without any ancillary provisions, without any suitable directions to mould or alter the plain terms contained in the original agreement that one-fifth of the balance of the composite fund should follow the limitations contained in the will of Charles Pole with respect to his real estate. Having regard to the fact that the law is perfectly plain, and that any lawyer engaged at that time in petitioning the Vice-Chancellor would find it quite obvious that that provision could not be carried into its full effect, so that the personal estate should follow the limitations of the real estate without some ancillary provisions, it is very remarkable that no ancillary provisions, no suitable directions, were given to obviate what it is now contended must have been a patent blunder, patent to all parties and all lawyers engaged in the matter when the agreement was made and when the order was made. For my part I can draw no inference at all that there was an intention that further directions should be given as and when the time arose ; that there was to be some further moulding, some further alteration as and when it became wise that those further orders or mouldings should take place. It seems to me that though you may treat the agreement as entirely executory, yet when the order came to be made it was plain to all those engaged in it that the terms would be operative with respect to the direction that one-fifth of the ultimate balance should follow the will of Charles Pole with respect to his real estate only down to a limited time, the time limited as P. O. Lawrence J. has said, and that that one-fifth would become vested in the first tenant in tail by purchase under the limitations contained in that will.

Mr. Jenkins contended that we ought to treat the order that was made as, so to speak, being only an interim order under which all these questions were left to be further discussed and

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dealt with when occasion should arise, and, as in the case of the balance, a suitable opportunity was to be given to the parties to come and ask that their interests should be considered. Now be it remembered that not only was the order of the Court confirming the agreement made after careful consideration, as it says, of the interests of all parties in the three actions, but a further order was to be made in the matter and was made on November 18, 1870, by Stuart V.-C. himself, and again no directions or alterations were given or made. We are asked to infer that this matter has been left open, that this very plain and simple blunder was not dealt with, but was deferred to be dealt with at some suitable opportunity. One would have expected that if the intention of the parties was that the order that the personal estate should follow the real estate was to be made effective, at the time when the order of 1868 was made, application would then have been made for suitable directions to be contained in the order, and the fact that the order of 1868 is silent and merely declares that the terms which have been agreed upon are to be carried out, is in my opinion eloquent to show that the compromise was intended to stand as it stood at the time, and that the mistake now suggested was not intended to be corrected. I am unable to draw an inference that it was forgotten that this one-fifth of the ultimate residue was drawn not merely from realty but was drawn from a portion of the personalty of the testator, and that all the items of which it was composed, so far as they consisted of realty, were converted into personalty without any directions for reinvestment. It appears to me that it is impossible to say that we can now discover what the intention of the parties was, and that we ought to go back and mould the agreement afresh in order to carry out that intention. I do not agree that there is really any distinction between this arrangement to which effect has been given by the order of 1868 and the rigidity of a settlement or express trust or will. It seems to me that the agreement which was intended to be carried into effect by powers obtained from the Court when the order of the Court was made in respect

of it, did become just as rigid as any settlement or express trust or will. To go back now and to remould or to add suitable provisions in order to carry out what we may now, fifty-six years afterwards, think may have been the intention of the parties, would be to draw inferences without foundation. It is impossible to reopen a matter which became crystallized when the order was made in 1868. P. O. Lawrence J. was quite right in the view that he took, and I think this appeal should be dismissed.

WARRINGTON L.J. I am of the same opinion. By the will of Charles Van Notten Pole, who died on September 8, 1864, his real estate was settled in strict settlement, and under the limitations of that will in the year 1867 the estates were held to the use of Charles Richard Pole for life with remainder to his son, Edward Clitherow Van Notten Pole, for life with remainder, in the events which have happened, to Anna Matilda Pole in tail with limitations over under which if Anna Matilda Pole died without issue, as happened, in the life of her brother, the second tenant for life, the petitioner, Henry Arthur Pole Soppitt, would have been tenant in tail in possession at the death of that tenant for life; but in fact so long as Anna Matilda Pole lived (she died in the lifetime of the tenant for life), she was to be entitled to the first vested estate in tail in remainder expectant on life. Under those circumstances, in the year 1867 it was agreed as a family compromise that certain real and personal estate, partly of the testator and partly of Charles Richard Pole, his son, should be sold and dealt with as provided by that agreement. One of the provisions of the agreement was that, after certain payments had been made out of the proceeds of sale, one-fifth of the residue—that is all we have to deal with—was to follow the limitations contained in the will of Charles Van Notten Pole with respect to his real estate. That was all that the parties thought necessary to provide. The agreement for compromise contained no direction express or implied that the fund the agreement dealt with, which was personal estate—namely, actual money in cash, should be

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reinvested in the purchase of land to be settled to the uses of the will, nor anything to suggest that the fund was in any way to be treated as other than the personal fund which it in fact was. Now the result of settling the personalty to follow the limitations of realty is perfectly well known. The personal fund would be held for those persons who are entitled to that real estate until you reach a person entitled to a vested estate of inheritance. The law recognizes no estate in personalty other than a life estate, or an absolute interest, and as soon, therefore, as personal estate is found to be held upon a limitation which in the case of real estate is an estate of inheritance, it vests in that person absolutely. According to that well-known rule of law, personal estate held to follow the limitations contained in the will of Charles Van Notten Pole with regard to his real estate became the absolute property of Anna Matilda Pole, the first person who attained a vested estate in tail. She did not survive the tenant for life. The appellant is the first person who, if you are to regard the limitations of the real estate as applicable to the fund in question, would have been the tenant in tail who attained to actual possession of the estate, and he maintains that he is indeed entitled to the fund and not, as the learned judge has held, the legal personal representative of Anna Matilda Pole.

We are asked to say that the provision contained in the agreement which I have already read was contrary to the manifest intention of the parties, and that it was competent to the Court when the agreement of 1867 was sanctioned and when the order of 1870 was made carrying over the fund to a separate account, so to model the agreement of the parties as to give effect to what is said to be a manifest intention—namely, that the fund should not vest in the first tenant in tail in the way I have described, either by inserting a trust for the reinvestment of the fund in the purchase of land so as to turn it back again into realty, or in some other way. I find myself entirely unable to see what was the intention of the parties except by looking at the words which have been used. They are words which are quite

commonly used when it is desired to provide that personalty shall go along with realty. The agreement here was arranged, as appears on the face of it, amongst the solicitors to the parties, and it was submitted to the Court then presided over by Stuart V.-C., and I cannot infer that the parties, their legal advisers, the judge, and everybody else concerned forgot the well-known rule of law to which I have referred. It seems to me that the only manifest intention of the parties was that the fund should remain personalty and should follow the limitations contained in the will regarding the real estate as far as the law would allow. That involves the legal consequences which I have mentioned, and I cannot find any intention to exclude those legal consequences.

I may mention that a particularly strong illustration of the impossibility of excluding the legal consequences of such provisions is to be found in *Portman* v. *Viscount Portman*. (1) That was an extraordinarily strong case for the argument that the rule of law had defeated the manifest intention of the parties. What had happened was this: A lady by her will had settled an estate called the Buxted Park Estate in strict settlement on the younger sons of a relation with a provision shifting the estate in case the younger branch should at any time become entitled to participate in the Portman title and estates. It is not quite accurate, but that is enough for the present purpose. Now that shifting clause was so framed that although it was perfectly valid with regard to the real estate, because all remainders over on an estate tail can be barred, it was invalid as regards personal estate. Her husband then gave certain chattels to follow the Buxted Park estate as far as the rules of law and equity would permit. The shifting clause was invalid so far as those chattels were concerned, and the result was that the chattels became vested in a certain young lady who had no interest whatever in the Buxted Park Estate, and the chattels therefore ceased to go with it. It was strongly argued there, just as it has been here, that some means ought to be found to give effect to what was said there, as it is said here, was the manifest

(1) [1922] 2 A. C. 473.

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intention of the two testators, particularly, of course, of the husband who dealt with the chattels themselves. But the House of Lords, confirming the judgment of Eve J. and the Court of Appeal, came to the conclusion that the consequences, though obviously contrary to the intention of the parties in one sense, resulted from an application of legal principles, and the Court was not at liberty to depart from those principles. I only mention that because that is a particularly strong illustration, much stronger than the present case. For these reasons I am of opinion that the judgment of P. O. Lawrence J. is correct, and that the appeal should be dismissed.

SARGANT L.J. I am of the same opinion. The agreement of compromise of November 16, 1867, is in a certain sense executory, as the learned judge thought; that is to say, it needed to be confirmed by the Court, and depended on the Court making an order for the sale of all or some parts of the real estate with which the agreement dealt. But that does not conclude the matter. In order that the appellant may succeed it is necessary to show that its executory effect goes much further; the appellant has to show that the words "one-fifth to follow the limitations contained in the will of Charles Van Notten Pole with respect to his real estate" were not a definite ascertainment of the destination of the funds, but meant and involved this: that there was to be a further settlement which should be so drawn as to mould the trust of the one-fifth so as either to direct its conversion into real estate, or at least direct it to be settled upon such trusts as are dealt with in the recent case of *In re Beresford-Hope*. (1) This I think the appellant has failed to show. If the agreement had been one between persons sui juris and had not had to be confirmed by the Court, I do not understand Mr. Jenkins to contend that the settlement comprised in the words "one-fifth" and so on, would not have been final; and I cannot see that any difference is made by the terms of the order sanctioning the compromise. In my

(1) [1917] 1 Ch. 287.

judgment the order sanctioned the agreement of compromise as it stood and not otherwise. It contained no direction pointing to the creation of a new or more complete and formal settlement. The final words of the order are fully satisfied by being referred to a number of other things that had to be done under the order, and I attach no importance to them for the purpose for which Mr. Jenkins relied on them.

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Appeal dismissed.

Solicitors: *Brooks, Jenkins & Co.; Young, Jackson, Beard & King; Saxton & Morgan.*

G. A. S.

HAVANA CIGAR AND TOBACCO FACTORIES, LIMITED *v.* ODDENINO.

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[1922. H. 2852.]

Trade Name—Passing-off Action—"Corona"—Name distinctive of Brand and also of Size and Shape—Request for "a Corona cigar"—Obligation of Seller to clear up Ambiguity—Injunction—Form of Order.

For many years the brand name "La Corona" or "Corona" had been used by the plaintiffs and their predecessors. It was not disputed that when used as a brand those words indicated cigars of the plaintiffs' manufacture. More than thirty years ago the plaintiffs introduced a new size name, "Coronas." Cigars of the Corona brand and Coronas, or Corona, size were known as "La Corona Coronas" or "Corona Coronas." This size name was adopted by other manufacturers and had for many years been used as a size name. In July, 1922, the defendant, in complying with a request for "some cigars—Coronas," supplied cigars of the Partagas brand and Coronas size. The defendant claimed the right in response to a request for a "Corona cigar," or any similar request so phrased as not to indicate whether the word "Corona" was used to refer to brand or to size, to supply a cigar of any brand provided it was of the Corona size. In an action brought by the plaintiffs claiming an injunction to restrain the defendant from selling, or supplying, or offering or exposing for sale, or passing off, or inducing or enabling others to pass off, cigars not of the plaintiffs' manufacture as or for the plaintiffs' "La Corona" brand of cigars by the use of any words consisting of or containing the word "Corona" as a brand name, and from selling or supplying, in response to orders for "Corona" cigars, cigars not of the plaintiffs' manufacture:—

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Held, that the words "a Corona cigar" being on the evidence proved to be ambiguous in meaning, the defendant, if he exercised the right which he claimed, would, in the majority of cases of a request for "a Corona cigar," be passing off goods not manufactured by the plaintiffs as goods of their manufacture.

Held, therefore, that the plaintiffs were entitled to an injunction restraining the defendant, his servants and agents from selling or supplying a cigar not of the Corona brand, unless it was first ascertained that the customer did not require a cigar of the Corona and no other brand, or unless it was made clear to him by word of mouth or otherwise that the cigar supplied was of a brand other than the plaintiffs' brand.

Decision of Russell J. [1923] 2 Ch. 243 affirmed.

APPEAL from the decision of Russell J. (1)

The action was a passing-off action in which the plaintiffs by their statement of claim asked for an injunction against the defendant in the following terms: An injunction to restrain the defendant, his servants and agents from selling or supplying or offering or exposing for sale or passing off or inducing or enabling others to pass off cigars not of the plaintiffs' manufacture as and for the plaintiffs' "La Corona" brand of cigars by the use of any words consisting of or containing the word "Corona" as a brand name and from selling or supplying in response to orders for "Corona" cigars cigars not of the plaintiffs' manufacture.

The plaintiffs were one of a group of five companies carrying on business in Cuba as manufacturers of Havana cigars. Among the brands of cigars manufactured by the plaintiffs there was a brand the full name of which was "La Corona," but this brand was commonly known simply as "Corona," without the "La." For a great number of years this brand name had been in use by the plaintiffs and their predecessors, and there was no dispute that (when used as denoting brand) the words "La Corona" or "Corona" meant cigars of the plaintiffs' manufacture, and it distinguished their cigars from the cigars of all other manufacturers. For many years it had been the habit of cigar manufacturers to attach different names to cigars of different sizes and shapes to indicate the size and shape of the particular cigar of their manufacture which bore that name.

(1) [1923] 2 Ch. 243.

These names were known as size names, and they usually appeared prominently on the side or front of the cigar-box, and on the yellow ribbon with which bundles of fifty cigars were enclosed. If one desired accurately to describe a cigar of a particular brand and of a particular size and shape of that brand, one would mention both brand and size name, thus, "La Corona Exceptionales," or "J. S. Murias Exceptionales." Those size names were legion; the same size name was used by many manufacturers, but cigars of different brands which bore the same size name were not necessarily of the same size and shape; thus, La Corona Exceptionales were not of the same size and shape as J. S. Murias Exceptionales. Further, cigars of the same brand and of the same size and shape might bear different size names, and a merchant might have a particular size name reserved for him by the manufacturer.

Some thirty years or so ago the owners of the Corona brand introduced a new size name—namely, "Coronas." Cigars of the Corona brand and of the Corona size and shape were known as "La Corona Coronas," or as "Corona Coronas." This size name was adopted by other manufacturers, and had now for many years been in common use as a size name. The size name did not always figure as "Coronas" in the plural. Used as a size name, the word "Coronas" and "Corona" indicated a cigar of a particular size and shape. According to the evidence of one of the plaintiffs' witnesses, Mr. Judge, "Corona" as a size name generally meant a cigar 5½ in. long, straight shaped, with a marble top or rounded end. Subject to additions and variations introduced by various witnesses, that was the shape and size of the cigar which was indicated by the use of the word "Corona" as a size name.

But on the other hand cigars of various brands which were in size and shape indistinguishable, or substantially indistinguishable, from the "Corona" size and shape were sold under size names other than "Corona."

In the case of the Flor de Cuba brand, the cigar to which the owners of that brand attached the size name "Corona"

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was, until recently, a torpedo-shaped cigar, quite different from the usual Corona size or shape, but since August, 1922, the Flor de Cuba cigars imported here with the size name "Corona" conformed to the usual Corona size and shape of cigars. There were, however, still on the market some of the torpedo-shaped Flor de Cuba Coronas imported before August, 1922. Further, there were many size names which contained the word "Corona" (or, more strictly, "Coronas"), with one or more words in addition, such as "Half a Coronas," "Petit Coronas," "Três Petit Coronas," "Coronas Imperiales." As to these the witnesses (with some four or five exceptions) agreed that they did not in any way indicate brand.

On July 25, 1922, four gentlemen lunched at the Imperial Restaurant, of which the defendant was the proprietor. There was no material conflict about what happened. At the close of the meal, what is called "a trap order" was given. One of the party said: "Waiter, bring me some cigars—Coronas." The waiter brought a mahogany box containing cigars of the Corona size and shape. The box was one on which appeared conspicuously the words "Calixto Lopez" in black letters on a square or oblong of ivory set in the lid, both outside and inside. The head waiter said something to the waiter. The waiter took away the box with the cigars in it, and returned with a plate on which there was a bundle of fifty cigars tied round with a yellow ribbon. These he placed before the party. There were no rings round the cigars. The actual ribbon was not identified, but it was a ribbon showing both brand and size name, the latter much more prominently than the former. That seemed to be a not uncommon feature of these ribbons, many of which were produced. The waiter was asked: "Are these Coronas?" He replied: "Yes; so were the others, but they had no band." The party, or some of them, looked at the bundle, and saw that the cigars were not of the Corona brand, but of the Partagas brand; they were Partagas Coronas. None of the party was in fact deceived; they did not expect to get

cigars of the Corona brand. The order was given to found proceedings against Mr. Oddenino.

Russell J. held on the evidence that to the majority of persons the words "a Corona cigar" meant a cigar of the Corona brand, but that there was no doubt that to many persons the words did not indicate brand but only size and shape. If the defendant exercised the right which he claimed in the majority of cases he would be passing off goods not manufactured by the plaintiffs as goods of their manufacture. He accordingly granted an injunction restraining "the defendant, his servants and agents from selling or supplying in response to any order for 'some cigars—Coronas,' or 'Corona cigars,' or 'a Corona cigar,' or 'Coronas,' or 'Corona,' cigars or a cigar not of the Corona brand unless it be first clearly ascertained that the customer who gives the order does not require cigars or a cigar of the Corona brand and no other brand."

The defendant appealed. The appeal was heard on November 1 and 2, 1923.

Luxmoore K.C. and *J. W. F. Beaumont* for the appellant. The appellant accepts the facts as found by the learned judge, except that he says that it is impossible to determine whether a majority or a definite proportion of persons when they use the word "Corona" mean brand or size.

On the facts and the law in this case, it is submitted the respondents are not entitled to an injunction. They have not proved that the word "Corona" exclusively denotes cigars of their manufacture. The word being ambiguous in meaning, the onus is not on the appellant to clear up the ambiguity. There has been no passing off by the appellant.

In *Reddaway* v. *Banham* (1) it was held by the House of Lords that a trader is not entitled to pass off his goods as the goods of another trader by selling them under a name which is likely to deceive purchasers into the belief that they are buying the goods of that other trader, although in its primary meaning the name is merely a true description of the goods.

(1) [1896] A. C. 199.

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The appellant here has done nothing to offend against the law as there laid down. *Cellular Clothing Co.* v. *Maxton & Murray* (1) is a direct authority against the respondents. To entitle them to an injunction the onus is on them to establish that the word "Corona" in the trade denotes exclusively goods of their manufacture: *Leahy, Kelly & Leahy* v. *Glover* (2); *A. W. Gamage, Ld.* v. *H. E. Randall, Ld.* (3); *Havana Cigar and Tobacco Factories, Ld.* v. *Tiffin* (1905), *Ld.* (4); *Jamieson & Co.* v. *Jamieson* (5), per Vaughan Williams L.J. (6) Here, it is submitted, the word "Corona" no longer means exclusively the goods of the respondents' manufacture.

The respondents, therefore, are not entitled to sue for passing off, because the word "Corona" being used ambiguously to denote both size and brand, they have failed to show that it exclusively denotes goods of their manufacture.

Even if the respondents are entitled to sue, they have failed to prove any conduct on the part of the appellant to justify an injunction being granted. The appellant has not been found to have done or to have threatened to do that which he was restrained from doing.

There is no case in the books in which a person has been restrained from using a purely fancy name which is ambiguous in its meaning. The present case is a new one. If an injunction is granted it will have a far-reaching effect. An injunction in corresponding terms could be obtained at the instance of those who say that "Corona" means size. A purchaser can protect himself by asking for what he wants. There is no necessity for the Court to lay down a new principle to protect a purchaser who does not take the trouble to protect himself.

W. A. Greene K.C., *L. B. Sebastian* and *D. N. Pritt* for the respondents. The sole question in this case is whether the use of the word "Corona" as a brand name is dead. In the Court below it was admitted on behalf of the respondents

(1) [1899] A. C. 326.
(2) (1893) 10 R. P. C. 141.
(3) (1899) 16 R. P. C. 185.
(4) (1909) 26 R. P. C. 473.
(5) (1898) 15 R. P. C. 169.
(6) Ibid. 191.

that no distinction was to be drawn between "Corona" and "La Corona" when brand was referred to. The great point therefore made by the defence went by the board at a very early stage. It is found as a fact in the present case that the primary meaning of "Corona" is brand and not size. It is submitted that the word has an exclusive meaning as denoting brand. The difference between this case and the cases cited is that the latter were all cases in which a trader was attempting to appropriate to himself a portion of the English language. Here the respondents are not attempting to do so. It is admitted that the name "Corona" has now come to be used as a size name, and it may be that when the respondents so first used the word they could have prevented other persons from so using it, but it is now too late. The right, however, to use the word as a brand name has not been lost.

In *Leahy, Kelly & Leahy* v. *Glover* (1) the plaintiffs were attempting to appropriate a common slang expression in the English language. The respondents are not doing that in this case.

It is a fallacy to say that the respondents must show that every person will be deceived by the use of the word "Corona." If this were so no passing-off case could ever succeed. The question is purely one of fact: are persons likely to be deceived by what the appellant is doing?

It is submitted that the word has not lost its distinctive meaning and become publici juris. The test laid down by Mellish L.J. in *Ford* v. *Foster* (2) as to whether a word which was originally a trade mark has become publici juris is "whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods." Applying that test to the present case the burden of proof is on the appellant, and he fails to discharge it unless he shows that the use of the word "Corona" has become so common that no one can be deceived. It therefore comes back to the question of fact:

(1) 10 R. P. C. 141. (2) (1872) L. R. 7 Ch. 611, 628.

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is the use of it by him calculated to deceive? For this purpose one must look at the effect of the general course of conduct pursued by the appellant to see whether there is deception. It is submitted that the general result of the appellants' practice must be deception. It is never possible to deceive all purchasers. The Court protects the unwary purchaser.

Reddaway v. *Banham* (1) and *Leahy, Kelly & Leahy* v. *Glover* (2) have no bearing on the present case. *Jamieson & Co.* v. *Jamieson* (3) was a case in which the plaintiffs were endeavouring to prevent a person trading in his own name, which is always a difficult case.

As regards fraudulent intention, the remarks of Cairns L.C. in "*Singer*" *Machine Manufacturers* v. *Wilson* (4) are applicable to the present case.

[WARRINGTON L.J. There is no fraud here. The appellant is asserting a right, and the question is whether he is entitled to it.]

In *A. W. Gamage, Ld.* v. *H. E. Randall, Ld.* (5) the question again was one of fact.

Luxmoore K.C. in reply. The question has now come down to this—namely, whether, where the meaning of a word has become ambiguous, a plaintiff can obtain an injunction in respect of the use of the word. The evidence here is that to a large number of persons the word means one thing and to a large number of persons another. Its meaning therefore being ambiguous no injunction can, it is submitted, be granted in respect of its use. The question is, what does the word mean at the time it is used? For thirty years "Corona" has meant either brand or size. The word was not originally descriptive, but subsequently became so when used to describe size and shape. It is admitted that if the respondents had brought an action thirty years ago they could have established that "Corona" then meant brand.

(1) [1896] A. C. 199.
(2) 10 R. P. C. 141.
(3) 15 R. P. C. 169.
(4) (1877) 3 App. Cas. 376, 391.
(5) 16 R. P. C. 185.

But it is now too late for them to do so. The respondents are now attempting to put themselves in the position in which they would have been if they had brought their action thirty years ago. The question is whether the respondents have now a right to an injunction, and it is submitted they have not.

In *Ford* v. *Foster* (1) the word there in question, "Eureka," meant one thing only. Here the word "Corona" may mean one of two things, size and shape and brand.

The effect of the form of injunction granted by Russell J. is that on each occasion on which the appellant is asked for a Corona cigar he is required to give an advertisement of the respondents' goods. That is a new form of injunction. There is not one like it in the books.

Cur. adv. vult.

Nov. 19. The following written judgments were delivered :—

POLLOCK M.R. This is an appeal from a judgment of Russell J. given in a passing-off action, whereby he granted an injunction to restrain "the defendant, his servants and agents from selling or supplying in response to any order for 'some cigars—Coronas,' or 'Corona cigars,' or 'a Corona cigar,' or 'Coronas,' or 'a Corona,' cigars or a cigar not of the Corona brand unless it be first clearly ascertained that the customer who gives the order does not require cigars or a cigar of the Corona brand and no other brand."

The facts of the case as found by the learned judge are clearly stated by him in the report of the case in the Law Reports (2), and his judgment also contains an analysis and summary of the evidence given before him. These are accepted by the appellant, and it is unnecessary to repeat them here, except in so far as it is useful to emphasize certain features which form the basis of the conclusion at which I have arrived.

Shortly put, Russell J. finds that the words "a Corona cigar" originally meant nothing but a cigar of the well-known

(1) L. R. 7 Ch. 611, 624. (2) [1923] 2 Ch. 243.

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"Corona" brand. The use for many years of the words "Coronas" or "Corona" as a size name in various brands has however attached to the words "a Corona cigar" a further meaning—namely, a cigar of the size and shape indicated by one of the witnesses, but not necessarily of the Corona brand, although the words "a Corona cigar," used as a size name, denote to many people other features beyond mere shape and size. In the words of the learned judge (1): "To some the words exclude all cigars not made in Havana of Havana tobacco. To others the words include all cigars of the particular shape and size, wherever made, and of whatever tobacco made. Substantially all agree that the words involve that the cigar is made of high quality tobacco of the particular brand. This further meaning which the words 'a Corona cigar' have acquired is accordingly a descriptive meaning which, however, varies somewhat in the mouths of different speakers; but this element is common to all—namely, a cigar of the shape and size stated by Mr. Judge" (a director of the plaintiff company and one of their witnesses). "This descriptive meaning has not destroyed or supplanted the original meaning. To the majority of people the words 'a Corona cigar' mean a cigar of the 'La Corona' brand; but there is no doubt that to a large number of persons the words do not indicate brand, but size and shape." Russell J. thus finds that a request for "a Corona cigar" is more usually a request for a cigar of the Corona brand; on the other hand, it may be a request merely for a cigar of the particular size and shape. The request is ambiguous. He finds that those who intend to denote the brand by a request for "a Corona," outnumber those who use the same words to denote size and shape.

What took place at the luncheon party on July 25, 1922, which gave rise to the present action, is to be found stated in detail in the Law Reports. (2) It is important to define from the issues in the action what the claim made is and what it is not. Wrong inferences might easily be drawn from a hasty and imperfect appreciation of the nature of the action. What

(1) [1923] 22 Ch. 249, 250. (2) Ibid. 245.

was proved was that at the lunch in question, when cigars of the "Corona" brand were asked for, and the intention of the guests made clear by the question put to the waiter, who brought some cigars, "Are these Coronas?"—cigars not of the Corona brand but of another brand were tendered, although these were of the Corona size and shape. In the statement of claim the allegations are made that "The name 'Corona' when used as a brand or as the name or as the description of origin of a cigar is and has for many years been universally recognized by the trade and the public as indicating exclusively the plaintiffs' 'La Corona' cigars, and the said name has become and is so associated with the plaintiffs' cigars so that any person asking for or ordering 'La Corona' or 'Corona' cigars intends and expects to be supplied with cigars made by the plaintiffs," and that the defendant "has supplied and is in the habit of supplying cigars not manufactured by the plaintiffs to customers who order 'La Corona' or 'Corona' cigars, thereby representing and acting in such a manner as to mislead such customers into the belief that the cigars so supplied are of the plaintiffs' manufacture."

The defendant in his defence affirms that for fifteen years past the word "Corona" has been used to denote, and has denoted to the public and to those engaged in the cigar trade, a cigar of a particular size and shape, and not a brand of cigar. In para. 4 of his defence it is stated that "if a customer of the defendant asked for a Corona cigar, he would expect to be supplied, and would in fact be supplied, with cigars of the Corona shape and size and of any brand which the defendant for the time being stocked, and by being so supplied such customer would not be misled into the belief that the cigars supplied were of the plaintiffs' manufacture." The plaintiffs are the representatives of those who claim to establish that the words "La Corona" mean a brand. The defendant, who is supported in the action by the cigar manufacturers of Cuba other than the plaintiffs and their allied companies, affirms that the word "Corona" means shape and size, and claims that as a matter of right he is

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entitled and may continue to supply cigars of the shape and size of a "Corona," whatever their brand, in response to a request for a "Corona" cigar.

The defendant, Mr. Oddenino, is the keeper of a well-known restaurant in London. No moral reflection is cast by the decision in the case upon his conduct in the past. He is only the figurehead of the real defendants. The battle is joined upon the issue, whether, when a "Corona" cigar is asked for, meaning thereby a cigar of the "Corona" brand, it is permissible to supply that demand with a cigar of any brand provided that it is of the "Corona" shape and size. This claim made by the defendant is the short but sufficient answer to a subsidiary point taken by Mr. Luxmoore on his behalf, that no injunction ought to be granted, because the defendant has not been found to have done that which he is restrained from doing. The injunction will restrain him from doing what he claims to do, and, for the reasons which follow, in my judgment he is not entitled to do.

The judge, as already stated, has found that the majority of those who make use of the term "Corona" or "La Corona" intend a cigar of that brand, and that these words mean cigars of the plaintiffs' manufacture and distinguish their cigars from the cigars of all other manufacturers. It cannot therefore rightly be claimed that these words have become publici juris. The test laid down by Mellish L.J. in *Ford* v. *Foster* (1), by which a decision whether a word which was originally a trade mark has become publici juris is to be arrived at—namely, "whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods," when applied to the present facts, must be adjudged in the plaintiffs' favour. The plaintiffs still have the right to sell their own goods under their own name and to prevent others from invading the territory which is their property. "Nobody has any right to represent his goods as the goods of somebody else," is the clear principle of law, tersely stated

(1) L. R. 7 Ch. 611, 628.

by Lord Halsbury in *Reddaway* v. *Banham* (1); more fully by Lord Herschell in the same case (2), where he adopts the following words of Lord Kingsdown in the *Leather Cloth Co.* v. *American Leather Cloth Co.* (3): "The fundamental rule is, that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot therefore (in the language of Lord Langdale in the case of *Perry* v. *Truefitt* (4)) 'be allowed to use names, marks, letters or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person." "It is, in my opinion," said Lord Herschell in *Reddaway* v. *Banham* (5), "this fundamental rule which governs all cases, whatever be the particular mode adopted by any man for putting off his goods as those of a rival trader, whether it is done by the use of a mark which has become his trade mark, or in any other way."

Applying this principle to the present case, no one is entitled to pass off a cigar of the Partagas or Flor de Cuba brand as being of the "Corona" brand, even though it may be of the "Corona" shape and size. This conclusion does not decide that the word "Corona" may not be used to describe size and shape wherever the term is, or can be, used without importing any deception.

The cases cited by the appellant do not controvert or alter the principle laid down as above. In *Cellular Clothing Co.* v. *Maxton & Murray* (6) the term in question, "cellular," was held not to have acquired a special meaning so as to denote only the goods of the appellants. In *Leahy, Kelly & Leahy* v. *Glover* (7) it was held that the defendant's mark had not caused any deception. In *Jamieson & Co.* v. *Jamieson* (8) the Court of Appeal held that the defendant's goods had no similarity to the plaintiff's except in features that were common to the trade—that there was no passing off—and refused to grant an injunction. In *A. W. Gamage, Ld.* v.

(1) [1896] A. C. 199, 204.
(2) Ibid. 209.
(3) (1865) 11 H. L. C. 523, 538.
(4) (1842) 6 Beav. 66.
(5) [1896] A. C. 199, 209.
(6) [1899] A. C. 326.
(7) 10 R. P. C. 141.
(8) 15 R. P. C. 169.

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H. E. Randall, Ld. (1) the jury found that there was no passing off, and the direction of Lord Russell to the jury was upheld. Collins L.J., however, in the course of his judgment points out in clear terms that the foundation of a passing-off action is a simple question of fact, and that primarily the plaintiffs must establish that the particular brand in question connoted the plaintiffs' goods and no other. On this point the learned judge in the present case has found in the plaintiffs' favour. The decision in *Havana Cigar and Tobacco Factories, Ld.* v. *Tiffin* (1905), *Ld.* (2) sustains the plaintiffs' claim that in 1905 "La Corona" was a brand belonging to the plaintiffs, and that to serve a cigar of another brand in response to a demand for a "Corona" was a passing off that justified the grant of an injunction.

The defendant, however, argues that the antithesis in the present case is not between A.'s goods and B.'s goods. He claims that the word "Corona" is of ambiguous meaning. It is a different use and meaning of the word which is relied upon by the defendant to avoid the acceptance of the meaning which he says may be, but not must be, intended by a customer. The defendant claims to be entitled to the benefit of the doubt occasioned by the use of an uncertain word and to be entitled to resolve that doubt in his own way and to his own advantage. He claims that an injunction ought not to be granted to protect the use of a name or word unless it has acquired, universally, a particular meaning. To this latter claim it may at once be answered that no such standard of proof is required in a passing-off case. If it were demanded, it would not in most cases be forthcoming. The true standard is that involved in the third and essential question left to the jury in *Reddaway* v. *Banham* (3): "Do the defendants so describe their belting as to be likely to mislead purchasers?" The reply to that question was "yes," and upon that answer the House of Lords founded their decision and applied principles, old and well known, as above stated. "Cases of this sort," said Lord Macnaghten in the House

(1) 16 R. P. C. 185. (2) 26 R. P. C. 473.
(3) [1896] A. C. 199, 201.

of Lords in the same case (1), "must depend upon their particular circumstances. The facts of one case are little or no guide to the determination of another." In *A. W. Gamage, Ld.* v. *H. E. Randall, Ld.* (2), already referred to, Collins L.J. points out that a passing-off case depends upon an issue of fact.

The essential facts of the present case have been found in the plaintiffs' favour. They have been held to own the "Corona" brand. It has been found that the majority use the term "Corona" in the sense of meaning that brand. Can the defendant rely upon the practice of the minority to justify his claim? The integrity of such a course may be estimated by the answers of three witnesses called for the defendant. Mr. Tucker said in answer to a question whether it would be fair if he was asked for a "Corona" cigar to hand a cigar of the Partagas factory that it would be improper to do this, for it would be giving a customer what he did not want. Mr. Roberts said an inquiry for a box of Coronas would be of uncertain meaning to him, but that he could not fairly deal with such a customer until he had ascertained what he wanted. Mr. Padro said that if a man asks for a "Corona" cigar, it is doubtful without context what he wants. But he admitted that, as an honest man, he would inquire whether it was the brand or the size that was required.

"A man may take the trade mark of another ignorantly," said Lord Cairns in "*Singer*" *Machine Manufacturers* v. *Wilson* (3), "not knowing it was the trade mark of the other; or he may take it in the belief, mistaken but sincerely entertained, that in the manner in which he is taking it he is within the law, and doing nothing which the law forbids; or he may take it knowing it is the trade mark of his neighbour, and intending and desiring to injure his neighbour by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the plaintiff is just the same. The action of the Court must depend upon the right of the plaintiff, and the injury done to that right."

(1) [1896] A. C. 220. (2) 16 R. P. C. 185, 200.
(3) 3 App. Cas. 376, 391.

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In the present case, the defendant claims the right to assume that on a demand for a "Corona," a cigar of any brand—if of the "Corona" shape and size—may be served. For the reasons above stated, in my judgment, the plaintiffs have established their right and are entitled to protection against such a claim. For reasons which Warrington L.J. will state and with which I agree, the terms of the injunction must be slightly modified; but the appeal will be dismissed with costs.

WARRINGTON L.J. [after recapitulating the plaintiffs' and the defendant's contentions and the judgment below]. The defendant appeals and insists on his right to do what by his defence he claims to be entitled to do. It was contended also that the evidence of actual practice was sufficient to establish that the customer was always sufficiently informed of what brand was the cigar supplied. I will assume that this was so, though I am not satisfied of the fact; but this would afford no answer to the plaintiffs' case, having regard to the wide claim made by the defence.

The question is one of law. As to the general principle, there can be no dispute. No man can be permitted by any means to represent, when asked for goods of the plaintiffs' manufacture, that other goods are such as are asked for and thus to pass them off as and for the plaintiffs' goods. It is clear that if the defendant were asked for a cigar of the Corona brand and supplied one of another brand without explanation he would be tacitly representing it to be of the brand asked for and would be doing what in law would be regarded as a dishonest act and would be a legal wrong, the repetition of which might be restrained. Is it a sufficient answer for the defendant to say: "The order is ambiguous and I am entitled to interpret it in such way as is convenient to myself and to act accordingly by supplying a cigar of the Corona shape and size but of any brand"? The answer should, in my opinion, be in the negative. The name "Corona" was, until a comparatively recent time, a name which denoted exclusively the plaintiffs' cigars. It has now acquired, side by side with

this signification, another one, and its use in this sense is open to the public. Has it thus become altogether publici juris so that the plaintiffs cannot obtain even the limited form of injunction granted by the learned judge ?

The case raises a new point on which there is no direct authority and which must be dealt with on principle. The defendant claims, and, unless restrained, will act on his claim, to supply in all cases, when asked simply for a Corona cigar, one not of the plaintiffs' manufacture. He would thus, in the majority of cases, be passing off a cigar not of the plaintiffs' manufacture as and for one of the plaintiffs', and this by his claim he threatens and intends to do. It is true he does not know without inquiry in which sense the word is used in the order, but he does know that in a large number of cases it would be used to denote the brand required, and, in my judgment, he is not entitled recklessly and without caring whether his action infringes the plaintiffs' rights or not to do that which in fact infringes such rights. I am of opinion, therefore, that the judgment was correct. I think, however, the form of the injunction should be slightly varied by adding the words " or unless it be made clear by word of mouth or otherwise that the cigar or cigars supplied is or are of a brand other than the plaintiffs' brand."

As to the authorities, I have little to say, for, as I have already stated, they are not directly in point. In *Reddaway* v. *Banham* (1) and in *Cellular Clothing Co.* v. *Maxton & Murray* (2) the question was whether a name originally descriptive had obtained a secondary meaning as denoting exclusively the plaintiffs' goods. This question does not arise in the present case, for it is not disputed that the word " Corona " used as a brand name denotes exclusively the plaintiffs' goods. Nor have we been referred to any expression of opinion on the part of any of the learned judges concerned in those cases inconsistent with the view taken by the learned judge or by myself.

In my opinion the appeal fails. The variation I have suggested above does not materially affect the result, and

(1) [1896] A. C. 199. (2) 15 R. P. C. 581.

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I think, therefore, the appellant must pay the costs of the appeal. It is fair to the appellant to say that he is not defending the action in his own interest but in that of the manufacturers of cigars of other brands but of the Corona size and shape, by whom he is "protected" against the costs, and it is on their behalf and at their instance that the claim of right which has failed has been made.

SARGANT L.J. We are not here concerned with the particular facts as to the supply by the defendant through his waiters of cigars on the occasion which was the starting point of this action. We have to deal with the general question clearly raised by the pleadings—namely, whether the defendant (and as a consequence other retailers in the like position) are entitled in response to a demand for Corona cigars to make a practice of supplying without more cigars which are not of the Corona brand but are of a size and shape known as Corona. Or, in other words, can he sell as "Coronas" cigars which are not of the Corona brand? The facts as to the meaning of the term "Corona" have been very clearly found by the learned judge after a most exhaustive inquiry, and are not questioned by the appellant; and henceforth, at any rate, he must be deemed to act with full knowledge of those facts as so found. Any previous ignorance or contrary belief on his part is quite immaterial: see the remarks of Lord Cairns in "*Singer*" *Machine Manufacturers* v. *Wilson*. (1)

Russell J. has found that the majority of customers who ask for a Corona or a Corona cigar desire and intend to be furnished with a cigar of the Corona brand, and not merely with a cigar of Corona dimensions. It follows, therefore, that the practice contended for by the appellant would result in more than half of these customers receiving, without any explanation, an article different from that which they in fact required and intended to demand. Did every customer asking for a Corona cigar desire to receive a cigar of the Corona brand, it is clear that the defendant's practice would amount to a passing off of the clearest and most elementary kind in

(1) 3 App. Cas. 376, 391.

every case. Is a new complexion put on the matter in the case of the majority, who are in fact similarly deceived, because there are a minority of customers who obtain what they require ?

The defendant asserts that all the difference is made by the ambiguity of the terms of the demand, and that, the request being ambiguous, he is entitled to determine the ambiguity in his own favour and supply a class of article which is either the only class in his stock or will yield him a larger profit than he would obtain from the supply of a cigar of the Corona brand. And he is supported in this contention by the rival makers of cigars not of that brand, who naturally desire the largest market for their wares. But to my mind this contention is contrary to the plain rules of ordinary morality. It cannot, in my judgment, be legitimate to adopt a practice which deliberately takes advantage of an ambiguity of language, and will in the result and to the knowledge of the vendor deceive a majority of his customers. Such a practice is not merely inconsistent with that higher standard of honour or ethics which would be adopted by a specially conscientious trader, but directly violates those ordinary everyday principles of honest trading which the Courts have consistently endeavoured to enforce. The fact that it may be impossible to predicate for certain of any particular customer that he is deceived is quite immaterial in view of the certainty that a majority of customers will in fact be so deceived, and that the resultant loss to them and to the owners of the Corona brand will be as great as if each victim had been definitely and separately ascertained.

It has however been strenuously contended on behalf of the appellant that these general considerations do not apply to a trade mark consisting of a word or words. It is asserted that in the case of a "word" mark the plaintiff cannot succeed unless he can establish that the word or words in question, when used in the market in which the transaction takes place, denote solely and exclusively the goods of the plaintiff and are inapplicable to the goods supplied by the defendant, or indeed apparently to any other goods than

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the plaintiff's. And this assertion is said to be supported by three cases of the highest authority—namely, *Leahy, Kelly & Leahy* v. *Glover*(1); *Reddaway* v. *Banham*(2); and *Cellular Clothing Co.* v. *Maxton & Murray.* (3) And it is necessary, therefore, that these three cases, and particularly the last two on which special stress has been laid, should be subjected to a careful examination.

When this is done, however, a striking and fundamental difference is at once apparent between those three cases and the present one. In the present case the plaintiffs have selected as their word-mark a word which is a foreign word and has no reference to the nature or quality of their goods. But in each of the three cases referred to the words forming the trade mark were words taken from the common stock of the English language, and were directly descriptive of the nature and characteristics of their goods. And, therefore, an extraordinarily heavy onus was cast on the plaintiffs to establish that, when the defendant's goods were described in terms which, according to the ordinary use of the English language, were as applicable to his goods as to the plaintiffs', these terms would not convey their ordinary descriptive meaning but would be understood as signifying simply and solely the plaintiffs' goods. Accordingly, the language of the judgments in each of those cases must be read with reference to the special difficulties under which the plaintiffs were labouring, and cannot be taken out of their surroundings and applied to the very different problem now before us without great allowance for this difference.

But beyond this I am not satisfied that, even in the case of trade marks consisting of descriptive words, these three cases establish that the plaintiff can never succeed unless he can show that the words are universally and exclusively used in the market with reference to his goods. No doubt in *Reddaway* v. *Banham* (2) the jury found in answer to the first and second questions put to them by the trial

(1) 10 R. P. C. 141. (2) [1896] A. C. 199.
(3) [1899] A. C. 326.

judge that camel-hair belting meant the plaintiffs' goods exclusively. And the judgments are based on that finding of fact. But the proposition that A. succeeds if he establishes that camel-hair belting means his goods and no one else's to all dealers in the market cannot be converted into the proposition that A. fails if he establishes something short of this—namely, that the phrase has this meaning to the majority only of dealers in the market. And great importance attaches to the third question put to the jury in *Reddaway* v. *Banham* (1), and also answered by them in the affirmative—namely: "Do the defendants so describe their belting as to be likely to mislead purchasers, and to lead them to buy the defenders' belting, as and for the belting of the plaintiffs?" I incline to think that this question was an even more crucial one than either of the first two questions. It might clearly have been answered in the affirmative, even if the answers to the first two questions had not been an out and out affirmative, but had been that the word meant the plaintiffs' goods not to all but to the majority of dealers in the market; and had these been the answers to the three questions, it is in my view impossible to say that the appellant would have failed.

On the contrary, there are at least two passages in Lord Herschell's speech and one passage in Lord Macnaghten's speech which tend in the opposite direction. Lord Herschell says (2): "I cannot help saying that, if the defendants are entitled to lead purchasers to believe that they are getting the plaintiffs' manufacture when they are not, and thus to cheat the plaintiffs of some of their legitimate trade, I should regret to find that the law was powerless to enforce the most elementary principles of commercial morality. I do not think your Lordships are driven to any such conclusion." And again he says (3): "In my opinion, the doctrine on which the judgment of the Court of Appeal was based, that where a manufacturer has used as his trade mark a descriptive word he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are

(1) [1896] A. C. 199, 201. (2) [1896] A. C. 209.
(3) Ibid. 210.

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getting the goods of the manufacturer who has theretofore employed it as his trade mark, is not supported by authority, and cannot be defended on principle. I am unable to see why a man should be allowed in this way more than in any other to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival." And Lord Macnaghten says (1): "I venture to think that a statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it; it is not sterling coin; it has no right to the genuine stamp and impress of truth." It is true that this passage speaks of intention to deceive, but deception, in fact, when once brought home to the knowledge of the vendor is, as Lord Selborne pointed out, equivalent to intention in the future. And it is true also that Lord Macnaghten has been speaking of inevitable deception in particular markets. But that does not postulate inevitable deception in every market; it is consistent with complete want of deception in other particular markets. And it is difficult to draw a distinction on principle between universal deception in certain markets only and the deception of the majority of customers in the general market. The percentage of total customers deceived may be as high in the latter case as in the former, or even higher.

The case of the *Cellular Clothing Co.* v. *Maxton & Murray* (2) seems at first sight rather more in favour of the defendant Oddenino, for there the owners of the descriptive trade name did actually fail, and one of the reasons of their failure was undoubtedly the descriptive character of their word-mark "Cellular." But when careful consideration is given to the facts in that case, as set out in the report (3), and as concisely summarized by Lord Watson in his speech, it becomes clear that this was not the sole, indeed hardly the most important, reason for the failure. In Scotland, where the respondents traded, and where the proceedings were brought, there was little, if any, knowledge of the appellants' goods; the respondents themselves

(1) [1896] A. C. 219. (2) [1899] A. C. 326.
(3) Ibid. 328, 329.

had never heard of the appellants; there was no evidence of any actual deception; and there was no reason to suppose that the methods of the respondents would result in or facilitate deception. The case seems to me to be no authority at all to justify the use of an ambiguous word-mark even if descriptive, so as to result in the deception of a majority or a large proportion of customers; still less is it an authority to justify such a use of an ambiguous non-descriptive word-mark.

As regards the earlier case of *Leahy, Kelly & Leahy* v. *Glover* (1) I cannot, after careful consideration, find that it advances the case of the appellant here any further than the two cases which have just been examined, and which are undoubtedly the most important and authoritative cases on the subject. It is therefore unnecessary to deal further with that case. Nor do I think that the case of *A. W. Gamage, Ld.* v. *H. E. Randall, Ld.* (2) is of any substantial assistance for the present purpose.

On the other hand, the case of *Ford* v. *Foster* (3), which was cited for the respondents here, has many similarities to the present case. There a non-descriptive word-mark "Eureka" had, as here, ceased to denote exclusively the plaintiffs' goods; but that was not held to be fatal to the plaintiffs' right of action; and the passage in the judgment of Mellish L.J. (4) is so germane to the matter now in question that I quote it in full. It runs thus: "Then the question is, has it become publici juris? And there is no doubt, I think, that a word which was originally a trade mark, to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become publici juris, as in the case which has been cited of Harvey's Sauce. (5) It was admitted that, although that originally had been the name of a sauce made by a particular individual, it had become publici juris, and that all the world were entitled to call the sauce they made Harvey's

(1) 10 R. P. C. 141.
(2) 16 R. P. C. 185.
(3) L. R. 7 Ch. 611.
(4) L. R. 7 Ch. 628.
(5) *Lazenby* v. *White* (1871) 41 L. J. (Ch.) 354*n*.

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Sauce if they pleased. Then what is the test by which a decision is to be arrived at whether a word which was originally a trade mark has become publici juris? I think the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone." Or, in other words, where the originally exclusive denotation of an ordinary non-descriptive word-mark such as "Eureka" or "Corona" has been extended so as to include some goods which are not of the plaintiff's make, the onus is precisely the opposite of that which is contended for by the appellant here. It is for the defendant who is supplying or offering goods under the word-mark to show that it has entirely lost its original meaning and that no purchaser can be deceived by its use. How completely the defendant has failed to discharge his onus here is shown by the unquestioned findings of the learned judge.

In my opinion the judgment of Russell J. is perfectly right, and the plaintiffs are entitled to an injunction. For myself I should have preferred to grant an injunction in a wider and simpler form—namely, to prevent the defendant from selling or offering for sale under the name "Corona" cigars which are not of the plaintiffs' make. Such an injunction would not prevent the defendant in answer to a request for Coronas from supplying with proper explanation cigars of another brand. But as the plaintiffs are content with the more limited form of injunction that has been granted, and as this form prohibits the specific form of passing off which

is insisted on by the defendant, and has been supported by the rival manufacturers, I agree that the order of this Court should be merely that the order appealed from should be slightly varied as suggested by Warrington L.J.

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Appeal dismissed.

Solicitors for appellant: *Wedlake, Letts & Birds.*
Solicitors for respondents: *McKenna & Co.*

W. I. C.

BRITISH THOMSON-HOUSTON COMPANY, LIMITED *v.* BRITISH INSULATED AND HELSBY CABLES, LIMITED.

RUSSELL J. 1923 *Nov.* 14–30; *Dec.* 4–7.

[1923. B. 263.]

Evidence—Admission—Oral Testimony in former Action against other Defendant.—Case lodged on Appeal to House of Lords.

Oral testimony, called in judicial proceedings to prove a certain contention, is not such an admission by conduct of the truth of that contention as to be admissible, in other proceedings, as evidence against the party who tendered the testimony. The case lodged on appeal to the House of Lords is in the nature of a plea, and statements in it may not be regarded in any subsequent action as admissions.

WITNESS ACTION.

In 1916 the plaintiffs brought an action against *Duram, Ld.* (1) for an infringement of their 1906 patent, and one issue of fact was whether the process disclosed by the patent was workable, that is, whether by following the directions of the 1906 patent it was possible to obtain a drawn-wire tungsten filament. Sir Arthur Colefax admitted that the plaintiffs contended in the *Duram* action that by following the directions given in the 1906 patent a filament of drawn tungsten wire could be obtained. In support of that contention the plaintiffs in the *Duram* action called three expert witnesses. The *Duram* action failed, but on a ground that

(1) (1916) 34 R. P. C. 117.

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made it unnecessary to decide that question of fact. In the present action the same plaintiffs sued different defendants for infringement of their patent, No. 23,499 of 1909, an invention for "improvements in and relating to the treatment of tungsten to facilitate working." The 1906 patent was pleaded in defence and the same issue of fact became material. In this action however the plaintiffs contended that it was impossible by following the directions of the 1906 patent to obtain a tungsten drawn-wire filament, and in support of that contention they called expert witnesses, but they called none of the experts who gave evidence in the *Duram Case*. The defendants now claimed: (1.) That they were entitled to read the evidence of the experts in the *Duram Case*, because the putting forward of that evidence was an admission by conduct that the evidence so given was true (it was not suggested that such an admission operated by way of estoppel, but that it constituted prima facie evidence which was admissible); and (2.) that they were entitled to read as evidence against the plaintiffs the case lodged by them when the *Duram Case* went to the House of Lords. (1)

Sir Duncan Kerly K.C., Courtney Terrell, R. Stafford Cripps and *D. H. Corsellis* for the defendants. The admission of a party made in the course of judicial proceedings is evidence against him in any action in which the fact asserted or admitted becomes material: per Crompton J. in *Richards* v. *Morgan* (2); and in this respect there is no difference between written and oral testimony: per Cockburn C.J. in *Richards* v. *Morgan*. (2) In *Evans* v. *Merthyr Tydvil Urban Council* (3) the Court of Appeal treated *Richards* v. *Morgan* (2) as having established the principle as part of the law. In *British Thomson-Houston Co., Ld.* v. *Duram, Ld.* (4) the plaintiffs called witnesses to prove that the 1906 specification disclosed an effective process, which those witnesses had worked, for producing drawn-wire filaments of tungsten. It is submitted that on the authorities

(1) (1918) 35 R. P. C. 161.
(2) (1863) 33 L. J. (Q. B.) 114, 122, 123.
(3) [1899] 1 Ch. 241.
(4) 34 R. P. C. 117.

the evidence of those witnesses, and the case lodged by the plaintiffs when the *Duram* action went to the House of Lords, are admissible in this action to prove a fact asserted by the plaintiffs—namely, that the 1906 specification disclosed an effective process.

Sir Arthur Colefax K.C., *J. Hunter Gray K.C.*, *Whitehead K.C.* and *Trevor Watson* for the plaintiffs. Where a party uses a deposition or affidavit he may in certain circumstances make that evidence against himself so that it can be used by a person not a party to the original proceedings. But that practice has never been extended to oral testimony given at the trial of an action. This distinction is clearly drawn in *Brickell* v. *Hulse*. (1) In *Gardner* v. *Moult* (2) Lord Denman said: "No doubt a party in a cause is not bound by all that his witnesses say at Nisi Prius, or in their depositions in Chancery," and Patteson J. said that he did not intend to depart from the principle laid down in *Brickell* v. *Hulse* (1)—namely, the distinction between evidence in a document produced by a party the contents of which he knew beforehand, and the evidence of a witness called by him. In *Richards* v. *Morgan* (3) the Court held a written document to be admissible, and it is submitted that the remarks of Cockburn C.J., as to there being no difference between written and oral testimony adduced to prove a particular fact, were obiter, and that the earlier cases lay down the correct law. The case lodged in the House of Lords, if not a pleading, is in the nature of one, and admissions in it cannot be regarded in any subsequent action as admissions: see Taylor on Evidence, 10th ed., p. 578, § 821.

RUSSELL J. The defendants in this case fully establish, by means of the admission the plaintiffs have made, what the contention of the plaintiffs was in the *Duram* action, but what I have to consider is whether the oral testimony of witnesses called to establish that contention is admissible as evidence in this action. The defendants claim that they

(1) (1837) 7 Ad. & E. 454, 456. (2) (1839) 10 Ad. & E. 464, 468.
(3) (1863) 33 L. J. (Q. B.) 114.

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are entitled to read the evidence given by three experts in the *Duram Case* on the ground that the putting forward by the plaintiffs of that evidence was an admission by conduct that the evidence so given was true. It is not suggested that such an admission operates by way of estoppel, but that it constitutes prima facie evidence which is now admissible.

There is no direct decision upon the point. There are conflicting views of various judges expressed in the course of judgments dealing with the admissibility in such circumstances of written evidence such as affidavits, depositions in Chancery, answers to interrogatories, and so forth, but it appears to me that oral evidence must stand on a somewhat different footing from written evidence. The litigant who calls a witness into the box no doubt expects him to give evidence in a certain way, and to depose to particular facts, but the witness may honestly, or perhaps dishonestly, give evidence which is completely contradictory of the case of the litigant who calls him. In the case of written evidence the litigant puts forward the evidence with full knowledge of its effect and contents, and so, by his conduct in putting it forward, may be taken to admit the truth of it. This distinction is emphasized in the authorities to which I have been referred on the point. *Brickell* v. *Hulse*(1) was a case where the evidence sought to be adduced was affidavit evidence, and the Court held that if a party, on a motion before a judge, used the affidavit of another person, that affidavit was, on any subsequent occasion, admissible as evidence against him who had used it, even on a trial when the person who swore the affidavit was present in Court and was not called. In delivering judgment Lord Denman C.J. said: "It is very important that this question should not be left subject to doubt. There can, I think, be no question but that a statement which a party produces on his own behalf, whether on oath or not, becomes evidence against him. . . . . *Rushworth* v. *Countess of Pembroke* (2) at first seems opposed to this view; for there the defendant was not permitted to use any of the

(1) 7 Ad. & E. 454, 456. (2) (1668) Hard. 472.

depositions made in an equity suit, where the plaintiff had been defendant. That decision, however, was founded on the nature of the proceedings in Equity. A party who uses such depositions does not know, beforehand, what they are: if he did, such cases would stand on the same footing as the present. He can only refer to what he expects will be produced; it is like the case of a witness called at Nisi Prius, whose evidence does not bind the party calling him. It is quite different from a case where a party produces, as part of his own statement, an affidavit of which he knows the contents." Lord Denman draws a clear distinction between the case where the evidence brought forward is evidence known in its entirety beforehand, and evidence at Nisi Prius, which, he says, does not bind the party calling the witness.

Patteson J. was also in favour of the admission of the evidence. Williams J. was of the same opinion, and Coleridge J. said (1): "On one side, the defendant makes an application to a judge, and arms himself with a statement, which he makes his own, and uses. That is clearly evidence against him afterwards of the facts in the statement. The statement may be of more or less avail: and it may be a matter of remark that the person making the affidavit is present and is not called. But that is not the question here. As to the depositions in Equity, they stand on the same footing with vivâ voce evidence given in a Court of law. A man does not make all that is said by a witness whom he calls evidence against himself hereafter. In Chancery, the depositions are sealed up from the time of their being taken until publication passes. That is like the case of a party calling a witness, whose evidence he does not hear till it is given."

In *Gardner* v. *Moult* (2) the question was as to the admissibility of a written deposition. Lord Denman was again a member of the Court and said: "The examination or deposition of Hay was clearly admissible evidence. The defendants send their servant to prove an act of bankruptcy; and they act on the statement made by him. There is no necessity for entering into the general doctrine. No doubt

(1) 7 Ad. & E. 454, 457. (2) 10 Ad. & E. 464, 468.

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a party in a cause is not bound by all that his witnesses say at Nisi Prius, or in their depositions in Chancery. But the defendants are here bound by the particular statement which their agent was sent to make."

Patteson J. emphasized his agreement with the distinction that had been drawn in *Brickell* v. *Hulse*. (1) He said: "The distinction pointed out in *Brickell* v. *Hulse* (1) is a sound one, and I do not intend to depart from it; but it is not material by what name the document is called." The matter was fully argued and considered in *Richards* v. *Morgan* (2), where Cockburn C.J. and Crompton J. held that depositions, taken under the old system (before November, 1852) and used by a party to a suit in Chancery for the purpose of proving particular facts, were admissible as primary evidence of the same facts against the same party in an action by a stranger, and allowed an affidavit in the former proceedings, as to value, to be used in the later proceedings, with a different plaintiff, for the purpose of proving parcels. The Court was divided in opinion. Blackburn J., who delivered the dissenting judgment, refused to admit the document at all, but he stated that in his opinion there was no distinction in principle between the case of written and the case of oral testimony. Crompton J. admitted the evidence on the ground that it was a document which had been used as a true document with knowledge of its contents beforehand. He said (3): "It must always be remembered that it is not the obtaining the affidavit or deposition, *but the making use of it as true, with knowledge of the contents*, which is the ground on which such evidence is supposed to be receivable." But he went on to point out that he recognized an exception in the case of oral testimony. He said: "Upon this state of the authorities I feel bound to hold that a document knowingly used as true, by a party in a Court of Justice, is evidence against him as an admission even for a stranger to the prior proceedings; at all events when it appears to have been used for the very purpose of proving the very fact

(1) 7 Ad. & E. 454. (2) 33 L. J. (Q. B.) 114.
(3) 33 L. J. (Q. B.) 121.

for the proving of which it is offered in evidence in the subsequent suit. I think also that it now appears that such depositions as those in question do not fall within the class of cases which establish, as a kind of exception, that a party is not bound by evidence he adduces without knowing what it may turn out to be, as in the common cases of the evidence of witnesses called at Nisi Prius by a party who cannot tell what they will say." The other member of the Court, Cockburn C.J., was also in favour of admitting the evidence, but he expressed the view that there was no distinction between the case of written testimony and that of oral testimony adduced to prove a particular fact. He said (1): " Bearing in mind that the true ground on which such evidence is admissible, is, that a party seeking to establish a fact by evidence in a Court of Justice, must be taken to assert the fact he so seeks to prove, it seems to me to follow, on the one hand, that oral evidence, so far as it shall appear to have been used to establish a specific fact, will be evidence against the party using it, as an assertion of that fact, and on the other, that written evidence will be admissible against the party using it in a subsequent proceeding with a different party, not for the purpose of proving all the statements it may contain, but only so far as it shall appear to have been used to establish a given fact or facts." It is to be observed that the decision in *Richards* v. *Morgan* (2) was merely a decision to admit written testimony, and, qua decision, it does not purport to affect, and cannot affect, the statement in the earlier cases of the distinction between the admission in such circumstances of oral and written testimony. *Richards* v. *Morgan* (2) was cited with approval in two subsequent cases, *Fleet* v. *Perrins* (3) and *Evans* v. *Merthyr Tydvil Urban Council* (4), but in each case the question in debate was the admission of written testimony, and in each of them *Richards* v. *Morgan* (2) was cited as an authority for the proposition that in those circumstances the written testimony might be admitted. In no case cited before me

(1) 33 L. J. (Q. B.) 124.
(2) 33 L. J. (Q. B.) 114.
(3) (1868) L. R. 3 Q. B. 536, 540.
(4) [1899] 1 Ch. 241.

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has oral testimony on behalf of a litigant in a litigation with A. been admitted as evidence against him in a litigation with B., on the footing of an admission. In *Cole* v. *Hadley* (1) oral testimony given in former proceedings seems to have been admitted in subsequent litigation between the same parties, but no reasons were given, and the ground may well have been the absence of the witness out of the jurisdiction. I feel sure, however, that in that case the Court, which included Lord Denman, Patteson and Coleridge JJ., did not purport to abolish the distinction, which they had recently asserted to exist, between the cases of oral and written testimony. There being no decision forcing me to admit the evidence, I am at liberty to act on my own view that it is not desirable to extend further a rule which results, or may result, in the inconveniences and difficulties so forcibly pointed out by Blackburn J. and Cockburn C.J. in *Richards* v. *Morgan*. (2) Accordingly I refuse to allow the evidence of the three experts in the *Duram Case* to be read in this case.

The defendants also claim to read as evidence against the plaintiffs the case lodged by them when the *Duram* action went to the House of Lords. It seems to me that the appellants' case, as lodged in the House of Lords, although not strictly a plea, is a document in the nature of a plea, and ought to follow the rule that governs pleas. That rule, as stated in Taylor on Evidence, 10th ed., p. 578, § 821, is that: "In respect to admissions by pleadings, the law at present seems to be that statements which are contained in any pleading, though binding on the party making them for all purposes in the case, ought not to be regarded in any subsequent action as admissions." In my opinion the case lodged by the plaintiffs in the House of Lords is not admissible as evidence against them in this action.

Solicitors: *Bristows, Cooke & Carpmael; H. C. Morris, Woolsey, Morris & Kennedy.*

(1) (1840) 11 Ad. & E. 807.

(2) 33 L. J. (Q. B.) 114.

J. B. B. M.

SOUTH EASTERN RAILWAY COMPANY *v.* COOPER.

C. A. 1923 Nov. 12, 13, 19.

Railway Company—Acquisition of Land—Severance—Easement—Grant of Way over Level Crossing—Agricultural Land—Alteration of Character of User—Increase of Burden—Ultra vires—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 68.

In 1844 the defendant's predecessors owned land through which the plaintiff railway company under the powers of their special Acts made a branch line, and for the purposes of their undertaking they purchased by agreement a portion of the land. The land so acquired abutted on a highway which in the course of making the railway had to be diverted, with the result that access to it was cut off from the defendant's land and one portion of the land was severed from the other. In order to restore the access to the highway and to connect the severed portions of the land, the railway company constructed a level crossing, and granted to the landowners a general right of way over it in wide terms for all purposes (subject nevertheless to the by-laws of the company relating to the use of level crossings on the branch railway). For many years the way was used by the defendant's predecessors for agricultural purposes only, but the defendant had recently opened a sand pit on his land and commenced to use the way for conveying the minerals across the line to the highway, and thus largely increased the burden of the easement.

In an action by the railway company for an injunction to restrain the defendant from using the crossing in excess of the extent to which it was used at the time of the grant:—

Held, that the grant being a grant of a general right of way for all purposes, and not merely of an "accommodation way," under s. 68 of the Railways Clauses Act, 1845, the user was not restricted to that which prevailed at the time of the grant; and further, that although the user had been considerably increased, yet the grant of the easement was not incompatible with the working of the railway and was not therefore ultra vires.

Rex v. *Inhabitants of Leake* (1833) 5 B. & Ad. 469 followed.

Mulliner v. *Midland Ry. Co.* (1879) 11 Ch. D. 611 explained and distinguished.

Decision of Romer J. (1923) 21 L. G. R. 439 reversed.

APPEAL from the decision of Romer J.

The facts are thus stated in the judgment of Pollock M.R. In 1836 the South Eastern Railway Company obtained an Act for the making of a railway from the London and Croydon Railway to Dover; and that Act contained a large number of sections dealing with specific matters which were necessary for the purpose of declaring the rights of the railway company

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and the owners of the land through which the railway was to pass, sections which ultimately became unnecessary after the time when the Railway Clauses Act had been passed in 1845. It will be necessary to refer to one or two of the sections in that Act of 1836 later on. In 1844 the South Eastern Railway Company obtained powers under an Act of that year to make a line from a point near Ashford to the City of Canterbury and the towns of Ramsgate and Margate, and to join the Canterbury and Whitstable Railway. That Act was supplementary, and gave the railway company increased powers over a different and added area; but the clauses dealing with the specific matters contained in the original Act of 1836 were to be deemed to be incorporated in the later Act of 1844.

The defendant's predecessors in title were the owners of certain lands which lay between Canterbury and a village called Sturry, and were adjacent for a considerable distance to a road called the Broadoak Road. For the purpose of constructing the railway under the Act of 1844 (that is to say the section from Canterbury which passes through Sturry) it became necessary to take a portion of the land which belonged to the defendant's predecessors in title, and particularly to divert the course of the Broadoak Road to a position further south, with the result that the access of the defendant's predecessors in title to the Broadoak Road was cut off. For the purpose of acquiring this land in order to construct the railway, it became necessary to make an agreement with the defendant's predecessors in title, and to purchase a certain portion of land belonging to them. As already pointed out, the making of the railway would have, so far as the lands of the defendant's predecessors in title were concerned, entirely cut off all the access which that land had had to Broadoak Road, and the consequence was that it was necessary that there should be first of all a substituted road equally convenient provided in place of the Broadoak Road which had originally gone further north; the rights of the defendant's predecessors in title to access to that road had also to be provided for.

The railway company negotiated for the purchase of a certain portion of the land, and they entered into an agreement dated February 22, 1845, whereby they were to purchase certain lands and hereditaments at a price of 1107*l.*, and which also provided that the defendant's predecessors should not ask for more than one crossing on the level of the railway at a specified point. That agreement was followed by a conveyance of the land comprised therein dated September 21, 1847. The conveyance recited that: "The pieces or parcels of land hereinafter particularly mentioned and intended to be hereby conveyed, and the fee simple thereof," were to be "free from land tax, quit rents and all incumbrances (except a right of way or crossing over the pieces of land intended to be thereby conveyed parts of the pieces numbered 38 and 41 in the deposited plans hereinafter referred to and which right of way is intended to be granted to the said John Melhuish, Robert Alexander Gray and David Browning Major and their heirs as such trustees as aforesaid by an Indenture bearing even date with and intended to be executed immediately after the execution of these presents)." On the same day, and immediately afterwards, there was a grant of the level crossing over the railway at a specified point marked on the map attached to the indenture, the grant being in these terms, that in pursuance and performance of the said agreement (that is to say, the first agreement that I have referred to, which was entered into upon treaty for the purchase of the said lands) and in consideration of the premises the South Eastern Railway Company "do hereby grant unto the said John Melhuish, Robert Alexander Gray and David Browning Major their heirs and assigns a right of roadway and passage for themselves their agents, servants, and workpeople on foot or on horseback and with carts, carriages, horses, and other animals or otherwise from time to time and at all times hereafter (subject nevertheless to the bye-laws of the said Company for the time being in force relating to the use of level crossings on the branch railway from Canterbury to Ramsgate and Margate in the said County of Kent) to pass and repass over and across the said two pieces or parcels

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of land situate in the Parish of St. Stephen aforesaid the ground plan whereof is delineated and distinguished as aforesaid in the said map drawn in the margin," and it was provided that the owners were to have a right of roadway "for the commodious use of the same crossing and the safe occupation of the lands thereto adjoining"; and that right was not in any way to be cut down or interfered with by the railway.

That was the way in which, in the year 1847, the railway company had overcome the difficulty which they had to face in executing the works which were authorized under their Act of 1844. They had acquired a certain portion of the lands of the defendant's predecessors, and they had satisfied their claim in respect to, not merely the severance, but to their claim to have access to the roadway which had formerly abutted upon their lands, and they had satisfied that by the grant of the roadway contained in the deed of September 21, 1847.

At the time when the railway was made and the right of way was granted it appeared that the defendant's predecessors used their land mainly for agricultural purposes. There is evidence that at that time there was a sand pit upon it, but it is not clear whether the roadway, or the purposes for which the defendant's predecessors wanted access to the Broadoak Road, was anything more than what might be called "agricultural purposes," using those words, not in a narrow sense, but as connoting all the purposes for which it would be necessary to have carts passing and repassing when the land was used, according to its nature, for agriculture. At the present time it has been found useful, and profitable, to work the sand pit which lies upon this land now belonging to the present defendant, and in connection with the user of the sand pit, a number of carts pass and repass over the level crossing, a number considerably in excess of those which passed before the sand pit was used, and at a time when, as it is claimed, the user of the land was solely for agricultural purposes. The railway company claimed that this user was in excess of the rights

which the defendant possessed under the grant of September 21, 1847, and accordingly on January 6, 1921, they issued a writ claiming a declaration that the right of way or level crossing granted was an accommodation right of way or crossing for agricultural purposes only, and that the defendant was not entitled to exercise the right or easement aforesaid for any purpose other than agricultural purposes or otherwise in such manner as substantially to increase the burden of the said easement by altering or enlarging its character, nature or extent as enjoyed at the date of the construction of the branch railway. And, secondly, an injunction restraining the defendant, his servants, workmen, and other agents from in any way using the crossing in excess of the way in which it was used for agricultural purposes at the time when the grant was made, that is to say, in 1847. After the writ was issued, a motion was made for an injunction, and that motion came on before Peterson J. on March 11, 1921. It was a motion for an interim injunction, and was not treated as the trial of the action. Peterson J. came to the conclusion that the words of the grant were very wide, that it was not cut down so as to show that the way was to be used only for agricultural purposes, as those existed in 1847, and he found that the roadway was not a mere matter of accommodation under s. 73 of the Act of 1836 (s. 73 being the section which is now in effect replaced by s. 68 of the Railways Clauses Act, 1845), and he held that it was a grant of a right of way for all purposes subject nevertheless to such restrictions as the railway company might properly consider to be necessary for the purposes of ensuring the safety both of the persons crossing the level crossing and of the persons travelling along the line of the railway. He accordingly dismissed the motion.

The action afterwards came before Romer J. for trial on March 14 and 15, 1923, and on March 27 he came to the conclusion that the plaintiffs had made out their case, and he granted an injunction. From that decision this appeal is brought, asking that judgment may be entered for the defendant.

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Hughes K.C. and *S. Duncan* for the appellant. The appellant is entitled to a right of way across the railway for all purposes, and is not limited to an accommodation way. The Railways Clauses (Consolidation) Act, 1845 (8 & 9 Vict. c. 20), by s. 68 provides for the making by railway companies of works for the protection and accommodation of lands.

Sect. 73 of the Special Act of 1836 corresponds with s. 68 of the Act of 1845.

As to the meaning of accommodation works see *Reg.* v. *Brown.* (1) It is submitted that the grant in this case was not limited to a mere accommodation way.

The company here, by giving the defendant a right of access in general terms, no doubt acquired the land at a lower price than they would otherwise have had to pay.

It is submitted that the effect of the documents here was to give to defendant's predecessors a general right of way over the railway, and not merely an accommodation way. As regards the generality of the grant, it is submitted that the user of the way over the railway is not restricted to the purposes for which the way was used at the date of the grant: *United Land Co.* v. *Great Eastern Ry. Co.* (2); *White* v. *Grand Hotel, Eastbourne, Ld.* (3) It must now be taken that the law is clear on that point. Romer J. accepted the defendant's view of the law, but held that the way over the level crossing was in the nature of an accommodation work. In a legal sense there is no such thing as a grant in the nature of an accommodation work. It is either an accommodation work or it is not. Unless it was something which came within s. 68 of the Railways Clauses Act, 1845, it is not an accommodation work.

It is said on behalf of the railway company that the grant of the right of way is so wide as to be ultra vires the company, and for that *Mulliner* v. *Midland Ry. Co.* (4) is relied on. That case, however, is distinguishable from the present. Here the railway company bought the land subject to the

(1) (1867) L. R. 2 Q. B. 630.
(2) (1875) L. R. 10 Ch. 586, 589.
(3) [1913] 1 Ch. 113.
(4) 11 Ch. D. 611, 617, 621.

right of access, and the reservation of this right operated as a re-grant. It is a common practice for railway companies to grant privileges to landowners in order to reduce the amount of the compensation for the land taken by them. There are numerous cases in which it has been held that a railway company may grant easements provided that they are not inconsistent with the purposes for which the land is acquired: see *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers* (1); *In re Gonty and Manchester, Sheffield and Lincolnshire Ry. Co.* (2) There is also a long series of cases showing that a company has power to dedicate land acquired for the purposes of its undertaking as a public highway, provided that its use by the public is not incompatible with the statutory objects of the company: *Rex* v. *Inhabitants of Leake* (3); *Greenwich Board of Works* v. *Maudslay* (4); *Grand Junction Canal Co.* v. *Petty* (5); *Foster* v. *London, Chatham and Dover Ry. Co.* (6); *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers.* (1) Dedication to the public of a level crossing is not ultra vires the company so long as its user is not incompatible with the statutory objects of the company: *Attorney-General* v. *London and South Western Ry. Co.* (7); *Great Western Ry. Co.* v. *Solihull Rural Council.* (8)

This is not a case of an accommodation work. In *Great Western Ry. Co.* v. *Talbot* (9) it was held that a landowner whose land had been severed by a railway was not entitled to use a level crossing so as to substantially increase the burden of the easement by altering or enlarging its character, nature or extent as enjoyed at or previously to the agreement for the accommodation work consisting of the level crossing. There was there no such grant as exists in the present case. That applies equally to *Taff Vale Ry. Co.* v. *Gordon Canning* (10); and *Great Northern Ry. Co.* v. *McAlister.* (11)

(1) [1910] 1 Ch. 12.
(2) [1896] 2 Q. B. 439.
(3) 5 B. & Ad. 469.
(4) (1870) L. R. 5 Q. B. 397.
(5) (1888) 21 Q. B. D. 273, 275.
(6) [1895] 1 Q. B. 711.
(7) (1905) 69 J. P. 110.
(8) (1902) 86 L. T. 852.
(9) [1902] 2 Ch. 759.
(10) [1909] 2 Ch. 48.
(11) (1897) 1 I. R. 587.

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[They also referred to *Hay* v. *City of Glasgow Union Ry. Co.* (1)]

Maugham K.C., *Manning K.C.* and *Cleveland-Stevens* for the respondents. Three questions arise here: (1.) Whether the user of the way by the defendant is such as to impose an additional burden upon the easement; (2.) On the construction of the grant, does it extend to a general right of way for all purposes, or is it limited only to such user as was contemplated at the time of the grant? (3.) Assuming the grant to have been for all purposes, was it not ultra vires the company?

There can be no doubt that the user now claimed by the appellant greatly exceeds that which was in contemplation at the date of the grant of the easement. A grant of an unlimited right of way for all purposes could never have been intended, and such a grant in the case of a railway company is ultra vires and void. The company could not grant a right the exercise of which would interfere with its obligations to maintain the service of the railway: *Ayr Harbour Trustees* v. *Oswald* (2); *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigation*. (3)

In *Mulliner* v. *Midland Ry. Co.* (4) Sir G. Jessel M.R. said that a railway company had no power by law to alienate any portion of the land actually used for the railway or works. That has never been adversely criticized. The case was followed in *Great Western Ry. Co.* v. *Solihull Rural Council*. (5) In *Great Western Ry. Co.* v. *Talbot* (6) the Court said: "On the other hand, the Legislature has not seen fit expressly to authorize a railway company to make general grants of easements over lands acquired for the purposes of its undertaking."

A railway company cannot grant, and therefore cannot dedicate to the public, a general right of way over and across their lines of rails or over land acquired by them for the purposes of their undertaking: *Attorney-General* v. *Great*

(1) (1874) 1 R. 1191.
(2) (1883) 8 App. Cas. 623, 634.
(3) (1866) L. R. 1 H. L. 254.
(4) 11 Ch. D. 611, 619.
(5) 86 L. T. 852.
(6) [1902] 2 Ch. 759, 765.

Central Ry. Co. (1) See also *Edinburgh Corporation* v. *North British Ry. Co.* (2); *County Hotel and Wine Co.* v. *London and North Western Ry. Co.* (3), where all the cases were collected by McCardie J., and *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers.* (4) The latter case does not touch the present, but Swinfen Eady J. there commented on *In re Gonty and Manchester, Sheffield and Lincolnshire Ry. Co.* (5)

What the appellant is doing here hampers the working of the respondents' railway. The reference to by-laws does not alter the position; it would be impossible to frame by-laws which would be effective to avoid the danger to the public. The grant must be considered apart from that.

[*Midland Ry. Co.* v. *Gribble* (6) was also referred to.]

Cur. adv. vult.

Nov. 19. Pollock M.R. [after stating the facts as above set out]. I should like to amplify one or two statements which I have already made. It is to be observed that the grant to which I have referred contains this statement, that the grant is made "subject nevertheless to the bye-laws of the said company for the time being in force relating to the use of level crossings on a branch railway." But that is really, I think it may be said, the only limitation upon the very wide words which are contained in the grant, and those wide words, if they were to be interpreted, would, I think, be held, in accordance with two recent decisions, to prevent the plaintiffs from restricting the user to what might be called mere accommodation purposes, or succeeding in the claim that they have made. The two cases to which I refer are *United Land Co.* v. *Great Eastern Ry. Co.* (7), and *White* v. *Grand Hotel, Eastbourne, Ld.* (8) On the other hand, if the true view were that this grant was merely a grant of accommodation access (that is to say a grant made under s. 73 of the Act of 1836, and to be treated in law as equivalent to an accommodation

(1) [1912] 2 Ch. 110.
(2) (1904) 6 F. 620.
(3) [1918] 2 K. B. 251.
(4) [1910] 1 Ch. 12.
(5) [1896] 2 Q. B. 439.
(6) [1895] 2 Ch. 129.
(7) L. R. 10 Ch. 586.
(8) [1913] 1 Ch. 113.

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way, under s. 68 of the Act of 1845), then different considerations would apply, because it has been decided in a number of cases that where you have accommodation works only, those accommodation works or accommodation ways—it does not matter which term is used—cannot be enlarged for subsequent purposes by increasing the user to an extent not contemplated at the time when the grant was originally made. Illustrations of that view may be found in *Great Western Ry. Co.* v. *Talbot* (1) ; in *Reg.* v. *Brown* (2) ; and in *Taff Vale Ry. Co.* v. *Gordon Canning* (3), where the decision to that effect is given, and *United Land Co.* v. *Great Eastern Ry. Co.* (4) is distinguished, and *Great Western Ry. Co.* v. *Talbot* (1) is followed.

Now, as I have pointed out, in this grant special words were introduced, which provided that the grant of the roadway should be subject to the by-laws of the said company, and it is a matter of remark that those words are introduced, because if the grant had been made under s. 73 of the original Act, it would have been unnecessary for the railway company to take in the indenture those specific powers as to their by-laws, for the reason that s. 73 itself provides that no works to be made thereunder are to be made in such a manner as to prevent or obstruct the working or using of the said railway. Perhaps if I may use the analogy made even clearer by s. 68 (which contains a proviso that the company shall not be required to make such accommodation works in such manner as would prevent or obstruct the working or using of the railway) it appears quite clear that if the accommodation works, or accommodation way which is to be granted, is to be treated as being made under s. 68 of the Railways Clauses Act of 1845 (or in this particular case under s. 73 of the Act of 1836), those accommodation works would imply a right on the part of the railway company to make such rules and regulations, or such by-laws for the working of the roadway so granted, as would prevent interruption or difficulty arising in the working of the railway.

(1) [1902] 2 Ch. 759.
(2) L. R. 2 Q. B. 630.
(3) [1909] 2 Ch. 48.
(4) L. R. 10 Ch. 586.

Three points were taken on behalf of the railway company in answer to the argument addressed to us for the defence, which argument, of course, dwelt upon the wide terms of the grant and emphasized the fact that specific limitation was introduced as to the by-laws, showing (so ran the argument) that in this case the works were not accommodation works, but were works which were granted as part of the terms on which the railway overcame the serious difficulty that was in their way, as they had to interfere, not only with the rights of the public by altering the public road and removing it further south, but with the important and particular rights of the landowners adjacent to that public highway. First of all it was said: Is a greater burden now imposed upon the railway than is imposed by the easement as originally granted or intended? Now upon this I think it is clear on the evidence that a larger burden is now made of the easement than was habitually imposed when the land was in the hands of the defendant's predecessors in title. The second question was: Is the grant limited to the user prevailing at the time it was granted in 1847? It was said on behalf of the defendant that the words are wide and general and fall within the two decisions already cited—namely, *United Land Co.* v. *Great Eastern Ry. Co.* (1) and *White* v. *Grand Hotel, Eastbourne, Ld.* (2) But the railway company says that it was a grant of accommodation works only so as to fall within *Great Western Ry. Co.* v. *Talbot* (3) and *Taff Vale Ry. Co.* v. *Gordon Canning.* (4) But, as I have already indicated, the landowner's land was adjacent to the whole of the railway, and having regard to the terms of the grant and to the circumstances surrounding the problem which beset the railway company at the time, I cannot, for my part, hold that this was a mere accommodation work under s. 73 of the Act of 1836 or in the nature of a work under s. 68 of the Railways Clauses Act of 1845.

Hay v. *City of Glasgow Union Ry. Co.* (5) may be usefully

(1) L. R. 10 Ch. 586.
(2) [1913] 1 Ch. 113.
(3) [1902] 2 Ch. 759.
(4) [1909] 2 Ch. 48.
(5) 1 R. 1191.

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looked at upon this point, because there the rights of the plaintiff were held to be good, on the ground that what the railway company was bound to supply the petitioner with was a substituted road equally convenient as the former road, or as near thereto as the circumstances would allow. In other words, it shows that there are cases in which the test of the accommodation road cannot be applied, and that there may well be grants which impose a greater burden upon the railway company than would be imposed upon them by grants made in satisfaction of their liability under s. 68 of the Railways Clauses Act of 1845.

Moreover, as I have already said, the reference to by-laws which are mentioned in the grant need not have been inserted, if the grant of this right of way had been made under s. 73 of the Act of 1836.

Then it was said that we ought to look at the agreement of February 22, 1845, as in some measure—I will not say overriding, but at any rate enabling us to construe the grant which was made in September, 1847. This point is one which seems to have impressed the learned judge in the Court below, but for my part I am very doubtful whether that agreement can be looked at for any purpose at all; because after the conveyance and the grant had been made, I should have thought that the purpose of the agreement was entirely exhausted. It is important to observe, too, that this agreement is not set out or recited, in either the conveyance or the grant, as being what might be called the fount and origin of the powers or property which is being conveyed in the two subsequent documents; still more, when you come to look at the actual document itself it appears to be the common printed form which was entered into between the parties in order to bring the matter up and to get an assent; but the actual terms which were finally determined must, in my opinion, be found in the documents which carry out the transaction, and certainly not in a document which was entered into for a different purpose, and not for the purpose of overriding the rights of the parties as granted in subsequent documents. Therefore,

upon the second point I come to the conclusion that the grant is not limited to the user which existed at the time it was originally granted, or for the purposes which were contemplated in 1847.

The third point taken was that if the grant was of the wider nature which I have held it to be, it was ultra vires on the part of the railway company to make any such grant. For the reasons I have given, I think it was necessary for the railway company, in order to meet the requirements of the landowner, to enter into an agreement and to grant a right of roadway which would be in the nature of a substitute for the road which he had enjoyed previously. But it is argued that the railway company had no such power, and that the grant was ultra vires, and the chief authority which is cited as justifying that proposition is *Mulliner* v. *Midland Ry. Co.* (1) That was decided by Sir George Jessel M.R., and it has been, perhaps, the authority to which all those who have argued the question of ultra vires on the part of railway companies have consistently clung. It is a case, in my opinion, of a very special character; it must be read in the light of this, that what Sir George Jessel was dealing with was a right of way under an archway on which the station in that case had actually been built by the railway company, and he said (2): "It is quite plain, therefore, that the land cannot be treated as land not required for the purposes of the railway. It is an integral part of the station"; and for that reason he held that it could not be treated as superfluous land falling within the section which enabled the railway company to dispose of superfluous land. The judgment in that case contains passages which have been relied upon here on the part of the railway company. It is right to say it has been commented upon in a series of cases. It was decided in 1879. In 1888, in *Grand Junction Canal Co.* v. *Petty* (3), observations were made upon it by Lord Esher M.R., Lindley L.J. (as he then was) and Lopes L.J. Lord Esher says this: "I do not think that the late Master

(1) 11 Ch. D. 611. (2) 11 Ch. D. 621.
(3) 21 Q. B. D. 273, 275.

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of the Rolls, in deciding *Mulliner* v. *Midland Ry. Co.* (1), meant to decide anything in contravention of what was decided in *Rex* v. *Inhabitants of Leake.* (2) On the contrary, it seems to me that what he decided was quite in accordance with that case, but I think that he was of opinion that the facts of the case with which he was dealing pointed to a different conclusion of fact from that on which the decision in *Rex* v. *Inhabitants of Leake* (2) was founded"; and an observation in the same sense was made by Lindley L.J. He says (3): "I do not think that case governs this, because there is no evidence to that effect in the present case." Then he says that the Master of the Rolls in *Mulliner* v. *Midland Ry. Co.* (1) "was clearly of opinion . . . . that the existence of such right of way was inconsistent with the statutory purposes for which the company had purchased and acquired the land." Then Lopes L.J. says words to the same effect. That case was subsequently commented upon in *In re Gonty and Manchester, Sheffield and Lincolnshire Ry. Co.* (4) by A. L. Smith L.J., Rigby L.J., and Swinfen Eady J., as he then was, and in *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers.* (5) It has also been commented upon by Joyce J. in *Great Central Ry. Co.* v. *Balby-with-Hexthorpe Urban Council* (6), where he says: "No doubt it has been tried, as in the present case it has been tried, to extend that decision beyond what the Master of the Rolls meant; but such attempts have failed."

The result is that I cannot hold that *Mulliner* v. *Midland Ry. Co.* (1) governs the present case. It seems to me to be impossible to hold that the action of the railway company, in making the grant of September 21, 1847, was ultra vires. The cases to which we have been referred all acquiesce in the view that *Rex* v. *Inhabitants of Leake* (7) is still good law. The principle stated is this: "If the land were vested by the Act of Parliament in commissioners, so that

(1) 11 Ch. D. 611.
(2) 5 B. & Ad. 469.
(3) 21 Q. B. D. 277.
(4) [1896] 2 Q. B. 439.
(5) [1910] 1 Ch. 25.
(6) [1912] 2 Ch. 110.
(7) 5 B. & Ad. 469, 478.

they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power." That authority has been upheld in all the cases to which I have referred, and it therefore seems to me to be impossible to say that *Mulliner* v. *Midland Ry. Co.* (1) has overruled *Rex* v. *Inhabitants of Leake* (2), and that where it is compatible with the use of the railway to make a wide grant of a right of way, subject to directions to be contained in by-laws, it cannot be said that such a grant is ultra vires the railway company. The cases which I have cited all establish that such a grant, when it is not incompatible with the uses of the railway, can be made.

I only want to refer to one more case, and that is *Great Western Ry. Co.* v. *Solihull Rural Council.* (3) That is a particular example of the case where a grant would be inconsistent with the user for public purposes, and it was held, therefore, that any such grant would be ultra vires; where it is not incompatible with the user for public purposes there seems to be, and there is, no reason why the grant should not be made. Therefore it seems to me that the point of ultra vires fails. The grant that has been made is a wide one; it is not a grant made for accommodation purposes only, and for the reasons which I have given, it appears to me that the original decision of Peterson J. upon the motion was right, that the plaintiffs have not established their claim to restrict the purposes for which this right of way can be used; and that judgment in the action ought to be entered for the defendant. The appeal, therefore, will be allowed with costs.

Warrington L.J. Under a deed of grant executed in 1847 by the plaintiffs, the South Eastern Railway Company,

(1) 11 Ch. D. 611. (2) 5 B. & Ad. 469, 478.
(3) 86 L. T. 852.

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the defendant is entitled to a right of way on the level over the plaintiffs' railway at a point between Canterbury and Sturry on the Margate branch.

By the judgment it is declared that "the Defendant is not entitled to use this way so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at the time of the construction of the Canterbury, Ramsgate and Margate Branch Railway."

The defendant appeals, contending that the way granted is one for all purposes, and that he is entitled to use it for the purposes for which he now desires to do so, without reference to those for which it was used at the time of the construction of the line. It is admitted that if the way was merely granted in pursuance of the statutory obligation as to making passages for the accommodation of severed lands, the judgment of the learned judge is correct, and the first point therefore upon which the appellant attacks the judgment is as to the nature of the way. On this he contends that the way was not an accommodation work but was an ordinary right of way granted on the occasion of the conveyance, and, in fulfilment of a special bargain, made a term of the acquisition by the company of the land required for the railway.

The defendant's predecessors were the owners of land through which, before the construction of the railway, there ran a high road from Canterbury to Sturry, and they had access to this road from land lying to the north of it. They were entitled to the soil of the road where it intersected their land. The plaintiffs proposed to take a strip of this land, including the site of the road, the latter being diverted and reconstructed south of the land in question. The line, therefore, when made would cut off the land to the north of it both from the road and from the other land owned by the same persons. The really important point was that it would cut off the land to the north, from the road.

Under these circumstances it was agreed, as appears by the recital in the conveyance, in these terms. [His Lordship read the material parts of the conveyance and the grant, and continued:] There is no question that if this were a

grant of a way by one person to another, the grantee would be entitled to use it for any purpose without reference to the purposes for which the dominant tenement was used at the date of the grant, and notwithstanding that the burden on the servient tenement was thereby increased: see *White* v. *Grand Hotel, Eastbourne, Ld.* (1)

But it is contended, and the judge has held, that on the true construction of the documents, and in view of the facts that the railway was built under statutory powers, and that by the statute provision was made for access, this access was provided under those powers and must be limited accordingly. As to the facts of user, there is no doubt that the recent user has much increased the burden. In 1847 the land was mainly pasture, and used as such, and the traffic was quite small. The defendant has been digging sand and gravel, and carrying on a trade therein, and there is now a considerable number of carts daily crossing the railway in both directions.

In construing the deed, regard must, I think, be had, not only to the actual terms of the statute and the deeds, but to the circumstances under which the transactions were carried out. Here were people who had land with free access to the high road (which before the railway was made was on their own land on both sides), and the railway was to be made on their land, and the road on their land diverted and reconstructed, with the net result that they would be deprived, not merely of communication between different parts of their land, but between the land and the road. Plainly, the user that they might make of any access to the road that they might at any time enjoy, would not be measured by the conditions or use of their land in 1847, but would extend to any lawful user.

Under those circumstances I consider the documents. The first of those documents is the Act of 1836, the company's special Act, under which a railway was constructed, and that special Act contained a section relating to what are commonly called accommodation works, and which are now provided for by s. 68 of the Railways Clauses

(1) [1913] 1 Ch. 113.

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Consolidation Act of 1845. The section was in these terms, reading it shortly. The company were to make and from time to time maintain "such and so many convenient gates in, upon, and adjoining the said railway . . . . bridges, arches, hollows, culverts, fences, ditches, drains, and passages over, under, or by the side of or leading to or from the said railway, of such dimensions and in such manner as two or more Justices of the Peace acting within their jurisdiction shall, upon the application of the owner or occupier of any lands, judge necessary and appoint (in case there shall be any dispute about the same)"—and now come these very material words—"for the use of the owners or occupiers of the respective lands through which such railway shall be made, and for the commodious use and occupation of the lands on either side of the said railway, or for protecting the said lands from trespass," and that the company were to maintain the works so made. I call particular attention to those words, upon which I have laid some emphasis, because they point to works for connecting simply two parts of the severed land, and have no reference to a work meant for the purpose of connecting a part of those severed lands with a highway to the use of which highway the owners of that land were previously entitled. They are simply for connecting two parts of severed land. Really the object of the way granted is not so much to give communication between severed parts of the vendor's land as is the proper function of an accommodation work, as to afford access from the land on the north to the diverted road; and it is from the latter that access is obtained to the land on the south of the railway.

It seems to me, therefore, that the proper conclusion from the documents and the surrounding circumstances is that the parties did intend to give something more than a mere accommodation work, and to preserve the right of access to the road in as ample a manner as they might have had it if the railway had not been made. In other words, that the grant ought to be construed as an ordinary grant of a right of way in general terms, with the result referred to above.

The learned judge, feeling himself unable to form a definite

view on the construction of the grant itself—an inability which I do not share—has made use of the preliminary agreement of 1845 to assist him in deciding on the construction. With all respect to him, he was not in my opinion entitled to look at this document for such a purpose. The agreement ultimately arrived at is stated in the conveyance, and the preliminary agreement is irrelevant; but in good truth that agreement when looked at affords no assistance, as it merely limits the vendors to one crossing in a particular field, and settles none of the details necessary to be fixed before the crossing would be made. Moreover, the agreement purports to be signed by the agent for a gentleman described as owner, who, it appears from the recitals in the conveyance, had no interest in the land, but was merely the husband of an equitable tenant for life for her separate use, and there is nothing to show under what authority, if any, of the real owners, his agent appended his signature.

But it is said that if the grant is to be construed as I think it ought to be, then, to the extent to which it confers greater rights than those which would have been enjoyed under an accommodation work, its execution would be ultra vires the company, and they would not be bound by it. The result of the authorities, I think, is this, not that a statutory company has no power to grant any easement unless expressly or impliedly authorized so to do by its constituent statute, but that its inability in this respect is confined to the granting of easements the enjoyment of which is incompatible with, or inconsistent with, the employment of their land for the statutory purposes for which it was acquired. For example, in the case of the *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigation* (1), it was held that the canal company could not bind itself so as to deal with surplus water flowing down a series of locks in such a way as to prevent it from conducting the business of its canal in the most efficient and prudent manner. In the same way it was held in *Great Western Ry. Co.* v. *Solihull Rural Council* (2) that a canal company could not dedicate a public

(1) L. R. 1 H. L. 254. (2) 86 L. T. 852.

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right of way over the banks of one of its feeding reservoirs on its being proved that the use of such a right would or might involve serious risk to the stability of the reservoir, and the possible destruction or serious injury of the canal itself, without at all events the expenditure of large sums of money, which would under the circumstances be expended not so much for the purposes of the company as for the maintenance of the highway.

In *Mulliner* v. *Midland Ry. Co.* (1) the Master of the Rolls held that to grant a right of way through an arch forming part of the substructure of a station and required by the company for the storage of goods in connection with their traffic was ultra vires. The use of the way would have entirely prevented the company from devoting the arch to the purpose for which it was required.

All these cases merely supply examples of circumstances which in the opinion of the Court rendered the grant of the easement in question ultra vires, as being inconsistent with the employment of their land for the statutory purpose.

On the other hand, there are a number of cases which support the general proposition I have stated above, and afford examples of easements which were not inconsistent with the public purposes for which the company in question was incorporated and acquired its property, and which were held to have been effectually granted.

Thus in *Rex* v. *Inhabitants of Leake* (2) the dedication by statutory commissioners of a public way over the banks of a drain constructed by the commissioners was supported. In that case Parke J. said (3): "If the land were vested by Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power.

(1) 11 Ch. D. 611. (2) 5 B. & Ad. 469.
(3) 5 B. & Ad. 478.

The mere circumstance of their not being beneficial owners cannot preclude them from giving the public this right."

In *Grand Junction Canal Co.* v. *Petty* (1) it was held that a canal company had effectually dedicated a public footway along the towpath of their canal. In both these cases the general principle mentioned above was affirmed and acted upon.

On the same principle, in *In re Gonty and Manchester, Sheffield and Lincolnshire Ry. Co.* (2) the grant of a private right of way through one of the arches of a viaduct carrying the company's railway was upheld; and *Great Western Ry. Co.* v. *Talbot* (3), and *Taff Vale Ry. Co.* v. *Gordon Canning* (4), were cases of accommodation works and therefore, on the construction I place on the grant, have no application.

There is in fact no decision against the validity of a grant of an easement, not an accommodation work in the proper sense, except in cases where its enjoyment was found to be inconsistent with the performance by the grantor company of its statutory duties. There is, in *Mulliner* v. *Midland Ry. Co.* (5), a dictum of Sir George Jessel M.R. which appears to have been much misunderstood. It is in these terms: "Therefore, there is nothing at all new or remarkable in the fact that the railway company has only these restricted and limited rights. It appears to me quite impossible that the railway company can have a right either to sell, grant, or dispose of this land, or of any easement or right of way over it, except for the purposes of their Act, that is to say, with a view to the traffic of their railway. This being my opinion, it would dispose of the plaintiff's case on the ground of general law being against him." That has been taken, especially in argument, to be a statement by the Master of the Rolls that a railway company or other statutory company has no power to grant any easement or right of way over its land without reference to the question of whether or not such grant would be incompatible with or inconsistent with

(1) 21 Q. B. D. 273.
(2) [1896] 2 Q. B. 439.
(3) [1902] 2 Ch. 759.
(4) [1909] 2 Ch. 48.
(5) 11 Ch. D. 623.

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the use by the railway of the land which they have acquired. But when it is looked at, it makes no such statement. It is merely this, that the company had no power to grant any easement or right of way over the land which was in question in that case; and the land in question in that case was, as I have already pointed out, part of the substructure of the station, and the actual bit of land that the roadway would have traversed was required by the company for the purposes of traffic to and from their station, as storage for goods. It is clear, when one looks at it, that that statement was made by the learned judge in reference to the facts of that case, and must not be extended further. If it were extended further, it would, in my opinion, be inconsistent with the judgments to which I have already referred in *Rex* v. *Inhabitants of Leake* (1); *Grand Junction Canal Co.* v. *Petty* (2); and *In re Gonty and Manchester, Sheffield and Lincolnshire Ry. Co.* (3)

I now turn to consider in the present case the question of fact whether the exercise of such a general right of way as in my opinion was granted by the railway company, would be inconsistent with the performance of its statutory duty of running trains with safety along the section of their line crossed by the defendant's level crossing. That a level crossing in itself is not open to such an objection is shown by the fact that such a crossing is one of the works which may be provided for accommodation under the provisions of the Act of 1836, and of course under s. 68 of the Railways Clauses Consolidation Act. Another fact which it is important to remember in dealing with this question is that in the grant itself the way is made subject to the by-laws relating to level crossings on this section of the line, and the company therefore have power to impose reasonable restrictions on its use, with a view to ensuring the safety of their trains and of the persons using the way across the line. I cannot think that the fact that the company may have to take, at some expense to themselves, certain special measures, such as the

(1) 5 B. & Ad. 469. (2) 21 Q. B. D. 273.
(3) [1896] 2 Q. B. 439.

provision of a man to control the user of the crossing at dangerous times, or of additional signals or such like, can render the user of the way to the extent to which the defendant has used it and claims the right to use it, inconsistent with the running of the trains with necessary safety.

It was unnecessary for the learned judge to deal with, and in fact he did not consider, this question, owing to his having arrived, on the construction of the grant, at the conclusion that the crossing was a mere accommodation work; but he recognized the general principle applicable to ordinary grants of a right of way as it is expressed above.

On the whole, I am of opinion that the appeal ought to be allowed and judgment pronounced for the defendant, with costs here and below.

Sargant L.J. (read by Warrington L.J.). In this case I feel compelled to differ from the very careful judgment of Romer J.

The matter was argued before the learned judge, and his judgment was founded, too exclusively upon the view that the obligations resting upon the company were merely those under s. 73 of the company's special Act, which corresponds with s. 68 of the Railways Clauses Act, 1845, and which prescribes the accommodation works that have to be constructed and maintained by the company. It appears to me, upon considering the peculiar situation of the lands of the then owner and the nature of the interference that was being caused by the works of the company, that it was the obligations under s. 71 of the company's general Act, corresponding with s. 53 of the Railways Clauses Act, that had mainly to be considered, and that probably formed the principal element in determining what the then owner was entitled to require.

The lands of the then owner abutted on the highway from Canterbury to Sturry, both on the north and on the south. On the south the access of the lands to the highway was not cut off by the authorized works. But on the north the frontage of the lands to the highway was completely taken,

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and the only means of approaching the highway from these lands was by a long detour to the east, which arrived at the highway on the north side of the Broadoak level crossing, and even then was at a substantially greater distance from Canterbury. Further, this detour would have involved the construction and maintenance of a private road, and could only be made use of so long as the owner's land to the east remained in his hands, or he should reserve a right of way thereover.

In these circumstances there was strong ground for thinking that, unless some substituted arrangement should be made, the owner might have insisted on having his existing rights of access to the highway substantially preserved by having a substituted public road made on the north of the railway, which would have involved two public level crossings, the one to the west and the other to the east: see *Hay* v. *City of Glasgow Union Ry. Co.* (1) On the other hand, if once the access of the northern lands to the highway, or any substituted highway, could be provided for, the necessity for any accommodation works in the ordinary sense would be gone. The owner, getting on the highway, either from his northern or his southern lands, could reach the southern or the northern lands, as the case might be, by means of the highway. And, as illustrating this, it may be pointed out that, although the level crossing, roughly indicated on the plan, is shown as extending into the lands on the south (possibly because a small dyke might have to be provided with a bridge), the level crossing as actually constructed runs south-east instead of south, and affords access to the highway only.

In this state of things, I see no reason for giving to the actual words of the grant of the easement in question any meaning short of their natural meaning—namely, a full and complete right of way for all purposes, a right of way analogous to, and as valuable as, that which the owner already had over the highway on which his northern land abutted. And, if this is the true construction, *White* v. *Grand Hotel*,

(1) 1 R. 1191.

Eastbourne, Ld. (1), shows, if authority were needed, that the right is not limited by any consideration as to the purposes for which the lands on the north were being used at the date of the grant. Further, I think that the reasoning in *United Land Co.* v. *Great Eastern Ry. Co.* (2) is applicable here mutatis mutandis.

Reference has been made to the terms of an antecedent agreement between the South Eastern Railway Company and the husband of one of the parties interested. Even if all the parties had concurred in this agreement, I do not think that its language could be referred to. In accordance with the recognized practice of conveyancers, this agreement is not recited or definitely referred to. There is merely a reference to the fact that the parties have agreed—it may be verbally or otherwise. The object and effect of this form of recital are to get rid of any obligations subsisting before the execution of the final document, and to make that document the sole record and measure of the rights of the parties to it.

I have still to deal with the contention that, if the construction of the document is that which I have arrived at, the grant of an unlimited right of way was ultra vires the company. This contention is much weakened by the consideration that this grant was one of the terms on which the company originally took the property, and seems to me inconsistent with the decision in the *United Land Co.* v. *Great Eastern Ry. Co.* (2) Further, if the right granted was, in fact, granted in lieu or satisfaction of a claim to have a public level crossing, or, indeed, two public level crossings, over the railway, the result is that, so far from granting more than they ought, the railway company have escaped with a far slighter burden than they might have had to carry; and it would be odd if such a transaction should be held outside their powers. And, lastly, the words providing that the right shall be exercised subject to any by-laws as to level crossings which the company might thereafter make, seem to me expressly and effectively designed to prevent the grant unduly hampering the operations of the company, while also

(1) [1913] 1 Ch. 113. (2) L. R. 10 Ch. 586.

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pointing to a construction of the document more consistent with a general grant than with a limited grant in respect of mere accommodation works.

Appeal allowed.

Solicitors for the appellant: *Burnie & Coleman, for Mercer, Baker & Bowen, Canterbury.*

Solicitor for the respondents: *H. H. Groves.*

G. A. S.

C. A. 1923. Nov. 21, 22, 30.

ELLIOTT *v.* BOYNTON.

[1922. E. 771.]

Landlord and Tenant—Lease—Breach of Covenant—Forfeiture—Mesne Profits —Date from which assessed.

Where in an action brought by a landlord against his tenant to enforce a right of re-entry for breach of covenant, an order is made that the landlord do recover possession of the demised premises and mesne profits, the mesne profits are assessable from the date of the writ in the action and not from the date of the breach of covenant giving rise to the landlord's right to re-enter:—

So *held* by the Court of Appeal, affirming the decision of Sargant J. [1923] 1 Ch. 422.

Compere v. *Hicks* (1798) 7 T. R. 727; *Pearse* v. *Coaker* (1869) L. R. 4 Ex. 92 applied.

Ocean Accident and Guarantee Corporation v. *Ilford Gas Co.* [1905] 2 K. B. 493 distinguished.

Appeal from the decision of Sargant J. (1)

By a lease dated January 31, 1918, the plaintiff demised to the defendant Boynton and one Dowsett No. 352 Goswell Road, Islington, for the term of fourteen years from December 25, 1917, at the yearly rents of 280*l.* and a sum in respect of insurance premium. The lease contained (inter alia) a joint and several covenant by the lessees not (except by will) to "sublet or part with the possession of the premises or any part thereof without the consent in writing of the lessor first had and obtained but such consent shall not be

(1) [1923] 1 Ch. 422.

unreasonably withheld in the case of a respectable and responsible person." The lease also contained the following proviso for re-entry: "Provided always and it is hereby declared that if the said yearly rents hereby reserved or any part thereof respectively shall be in arrear for the space of 21 days . . . . or if there shall be any breach or non-observance of any of the lessees' covenants hereinbefore contained then and in any of the said cases it shall be lawful for the lessor at any time thereafter into and upon the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as in his former estate."

On October 20, 1919, November 3, 1919, and December 15, 1919, the lessees sublet parts of the premises to different persons without asking for or obtaining the consent of the landlord. On December 30, 1919, the plaintiff gave his consent to an assignment of the lease to the defendant Boynton alone, and such assignment was duly effected. At this time the plaintiff was unaware of the sublettings effected by the lessees without his consent.

On May 15, 1920, the defendant Boynton sublet another part of the demised premises, and on October 28, 1921, he sublet to another tenant the portion of the demised premises originally sublet on November 3, 1919. The defendant Boynton failed to ask for or obtain the licence of the plaintiff in either case.

In March, 1922, the plaintiff for the first time became aware of these breaches of covenant, and after a short correspondence between the parties he issued a writ on May 12, 1922, against the defendant Boynton, in whom the premises were now vested as sole lessee, and his sub-tenants claiming to recover possession of the demised premises and mesne profits. No appearance was entered to the writ, and on June 26, 1922, an order was made that the plaintiff do recover possession from the defendants of the demised premises: "And it is further ordered that the plaintiff do recover against the defendant Albert Edward Boynton mesne profits to be assessed."

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On December 18, 1922, the Master made a certificate assessing the mesne profits at the sum of 841*l*. This amount was arrived at by assessing the mesne profits as from the date of the first breach of covenant on October 20, 1919.

This summons was taken out by the defendant Boynton for a review of the Master's certificate, and it asked that the certificate might be discharged or varied and that the mesne profits might be assessed only as from May 12, 1922, being the date of the issue of the writ in the action, or, alternatively, as from December 25, 1921, being the date to which rent had been paid, or in the further alternative as from October 28, 1921, being the date of the last breach of covenant.

Substantially the only point argued was whether the mesne profits ought to be assessed from the date fixed by the Master or from the date of the issue of the writ.

Sargant J. held that the mesne profits were assessable only as from the date of the writ to that of possession given, and that down to the date of the writ the tenant was liable for the amount of the rent and no more.

The plaintiff appealed. The appeal was heard on November 21 and 22, 1923.

W. A. Greene K.C. and *Ashworth James* for the appellant. The question is whether, when a lessor brings an action of ejectment against his lessee, who has broken a covenant not to assign, the lessor is entitled to mesne profits in respect of the period between the date of the breach and the issue of the writ. Sargant J. has held that the lessor's only right in respect of that period is to recover rent under the covenants of the lease. The point does not appear to be covered by authority. Rent reserved by the lease is now often considerably lower than the present annual value, so that the question is of importance, and that may perhaps account for the absence of direct authority, as this position as to rent did not often happen in pre-war times. The plaintiff here had a right to re-enter immediately after the breach of the covenant not to underlet. Mesne profits are really damages

for trespass, and where a person has a legal right to re-enter and take possession, but does not do so at once, when he commences an action for recovery his title relates back to the date of trespass.

It is submitted (1.) that an action for trespass is an action for damages, and (2.) that the doctrine of relation back applies: *Dunlop* v. *Macedo.* (1)

A neat example of the way in which the principle has been worked out is afforded by *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.* (2), where it was held that after entry by a mortgagee of land his right of possession related back to the time at which his legal right to enter accrued, so as to enable him to support an action against a wrongdoer for trespass committed at a time antecedent to the entry.

[WARRINGTON L.J. Does it follow in the case of a lease ?]

The lessor had a right to enter at a date and there was subsequent entry at a later date. Any intermediate trespass can be sued upon. The right to eject arose at the date of the breach. The principle is not inconsistent with the cases relied upon by Sargant J.

[POLLOCK M.R. referred to Cole on Ejectment, p. 408, where it is stated that "The lessor must do some act evidencing his intention to enter for the forfeiture . . . . and the lease will be avoided from that time only."]

[*Hartshorne* v. *Watson* (3); *Selby* v. *Browne* (4); *Jones* v. *Carter* (5); *Moore* v. *Ullcoats Mining Co.* (6); *Doe* v. *Shawcross* (7); and Bullen & Leake's Precedents of Pleadings, 7th ed., pp. 885, 886, were also referred to.]

It was only under the Common Law Procedure Act, 1852, that a plaintiff could join an action for mesne profits with an action for ejectment.

[POLLOCK M.R. referred to Furlong on Landlord and Tenant in Ireland, vol. ii., p. 1207.]

At p. 1005 of the same work the terms on which a person

(1) (1891) 8 Times L. R. 43.
(2) [1905] 2 K. B. 493.
(3) (1838) 4 Bing. N. C. 178.
(4) (1845) 7 Q. B. 620.
(5) (1846) 15 M. & W. 718.
(6) [1908] 1 Ch. 575.
(7) (1825) 3 B. & C. 752.

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could come in and defend the fictitious action are stated. See also ibid., p. 1012. It is conceded that the service of the declaration in ejectment was equivalent to the issue of the writ under the present practice.

[POLLOCK M.R. Sect. 214 of the Common Law Procedure Act, 1852, is still in force.]

Mesne profits are damages for trespass, and a claim for mesne profits may be joined in an action for possession: *Dunlop* v. *Macedo.* (1)

Under the old procedure a landlord could not maintain an action for trespass unless he was in possession, and it was therefore necessary for him to obtain an order in ejectment before he could maintain an action for trespass. The landlord could antedate his title to a date anterior to the fictitious demise: see Adams on Ejectment, 2nd ed. (1818), p. 333.

The plaintiff here ought not to be in a worse position because the defendant did not enter an appearance and there are no pleadings.

[POLLOCK M.R. The plaintiff has not pleaded when his title began.]

It is not usual to do so on a writ. If the plaintiff had served a notice on the defendant that would not have been an unequivocal manifestation of his intention to determine the lease. There must be actual entry or the issue of a writ. The latter is the usual method of determining a lease. If the lessor had made a demand on the lessee and the lessee had refused it would be very strange that the lessor could not have recovered mesne profits as from that date: Buller's Nisi Prius, 7th ed., p. 87.

In Cole on Ejectment (1857), p. 82, it is stated that "By bringing an ejectment the plaintiff elects to consider the defendant as a trespasser, and not as tenant, from the day on which the right of possession is claimed in the writ; and he cannot distrain or sue for any subsequent rent." That must mean writ or statement of claim, as the case may be.

[ASTBURY J. The plaintiff has not claimed mesne profits

(1) 8 Times L. R. 43.

from a date antecedent to that of the writ. He could have done so if he had liked.]

The modern form does not provide for any date being given.

If the plaintiff obtains judgment for mesne profits on the writ, that would mean such mesne profits as on the inquiry he should be found entitled to.

In *Terrell* v. *Chatterton* (1) the order asked for was for mesne profits from the date of the breach. The question as to the date from which the mesne profits ran was not argued either in the Court of Appeal or in the House of Lords. In the case of a breach the landlord has an option: he may sue either for the rent down to the date of the writ or for mesne profits from the date of the breach. The lessee cannot be heard to say that his own breach of covenant determined his lease. The material question is, when did the plaintiff's title first accrue?

[WARRINGTON L.J. It cannot be said that it accrued before the issue of the writ. Unfortunately, under the old procedure in ejectment a landlord was allowed to allege something that was not true.]

If the present judgment stands the tenant will derive a benefit from his own wrongful act.

It is submitted that the present case is typically one in which, on the terms of the lease, the title of the plaintiff to mesne profits relates back to the date of the breach.

Luxmoore K.C. and *W. M. Hunt* for the respondent Boynton. It is submitted that the judgment of Sargant J. is right and ought to be affirmed. If the tenant had asked for the landlord's consent, the sub-tenants being responsible persons, that consent would have been granted. A number of cases have been cited on the other side for the proposition that in a case of forfeiture the breach of covenant makes the possession of the tenant unlawful from the date of the breach. There is no direct authority on the point. What is the whole basis of the claim? Mesne profits are damages

(1) [1922] 2 Ch. 647; [1923] A. C. 578.

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for trespass, and the plaintiff must therefore show that the person against whom he claims them is a trespasser. A landlord by electing not to re-enter under the proviso for re-entry does not affect the lease. Under the proviso the tenant is not a trespasser until re-entry by the landlord. The proviso here does not provide that on a breach of covenant the lease shall become void.

[POLLOCK M.R. The question is, when did the right of the lessor become vested ?]

A lessee must be in either as a lessee or as a trespasser. If he is in as a lessee there can be no claim for mesne profits. A lessor cannot claim rent after a forfeiture. A tenant does not become a trespasser on a breach of covenant by him until the lessor takes advantage of it.

[ASTBURY J. referred to Bullen & Leake's Precedents of Pleadings, 7th ed., p. 891.]

It is submitted that there are two classes of cases: (1.) where the lessee was admittedly a trespasser at some time before action brought, in which case the title of the landlord relates back, and (2.) where he was not a trespasser, in which case the title does not relate back.

The rule, that a party cannot be made a trespasser by relation, is only applicable where the act complained of was lawful at the time: *Tharpe* v. *Stallwood*. (1)

Nearly all the cases referred to by the other side were cases in which the title related back to a date anterior to that on which the plaintiff obtained his title to re-enter.

Barnett v. *Earl of Guildford* (2) is distinguishable on its facts from the present case. The defendant there was a trespasser from the beginning. These were all cases of wrongdoers, and the question was who could sue for damages. A person cannot be made a trespasser by some subsequent election of another person.

[WARRINGTON L.J. Can you by an election turn a position which was lawful into a position that is unlawful ?]

No.

A person cannot be in the position of a trespasser until

(1) (1843) 5 Man. & G. 760. (2) (1855) 11 Ex. 19.

entry has been made. It is the issue of the writ that determines the lease, unless there has been a re-entry.

When once you have determined the lease you cannot claim rent. Until the lease is determined the rent continues.

[WARRINGTON L.J. On the authorities it appears that the relation of landlord and tenant continues until re-entry or the issue of a writ.]

Hartshorne v. *Watson* (1) shows that a covenant can be sued on after the lease has been determined.

[WARRINGTON L.J. I do not see how that case involves relation back.]

Selby v. *Browne* (2) is to the same effect. The lease remains a lease until re-entry, and the possession of the tenant is lawful possession. *Jones* v. *Carter* (3) is also to the same effect. Service there of a declaration in ejectment was the unequivocal act of determining the lease. Until that date the lease was a subsisting lease.

The text-books deal with the matter of ejectment generally, and do not deal with the question raised in this case.

It is submitted that the plaintiff's claim to mesne profits can never go back to a date antecedent to that on which the defendant first became a trespasser. In many cases mesne profits may be recovered from a date antecedent to the issue of the writ—e.g., where a lease has expired by effluxion of time or notice to quit, for in those cases the tenant is a trespasser from the date on which the term expires.

In Woodfall on Landlord and Tenant, 20th ed., p. 387, it is stated that "Generally speaking, where a forfeiture has been incurred for breach of any covenant or condition, the lessor must do some act evidencing his intention to enter for the forfeiture and determine the lease; and the lease will be determined from that time only." If the plaintiff's contention is right, what would be the position if after the breach of covenant entitling him to re-enter he had without knowledge of the breach distrained for rent, would he on

(1) 4 Bing. N. C. 178. (2) 7 Q. B. 620.
(3) 15 M. & W. 718, 726.

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re-entry by virtue of relation back be liable for damages for illegal distress ?

[They also referred to Mayne on Damages, 9th ed., 433.]

W. A. Greene K.C. in reply. No general principle can be extracted from the observations in *Doe* v. *Shawcross.* (1) In *Hartshorne* v. *Watson* (2) the question of relation back did not arise. In *Jones* v. *Carter* (3) the lessors were attempting to get rent after the commencement of these proceedings.

There is no direct authority that a lessor can recover rent for a period subsequent to the breach of the covenant on which he is relying.

Cur. adv. vult.

Nov. 30. The following written judgments were delivered :—

POLLOCK M.R. This is an appeal from a judgment of Sargant J.—now Sargant L.J.—given by him on February 23, 1923, upon a summons to review a certificate given by the Master in an action to recover possession of certain premises, subject to a lease, under a proviso for re-entry.

The facts are fully stated in the judgment, and it is unnecessary to repeat them here. By an indenture of lease dated January 31, 1918, the premises were demised to the defendant and another, whose interest is now vested in the defendant as sole lessee. There has been a breach of the covenant not to sublet or part with the possession of the premises, or any part thereof, without the consent in writing of the lessor, whereby the lessor—the plaintiff—has become entitled to recover possession.

There have been several breaches of that covenant. The earliest was committed on October 20, 1919. Subsequent breaches occurred, though all were committed without the knowledge of the lessor. By these breaches a profit rental was secured over and above the rent payable under the lease to the lessor, the now plaintiff. At some date in March,

(1) 3 B. & C. 752. (2) 4 Bing. N. C. 178.
(3) 15 M. & W. 718, 721.

1922, the breaches of covenant came to his knowledge, and on May 12 he issued his writ to recover possession.

No appearance was entered to the writ, and on June 26, 1922, it was ordered that the plaintiff do recover possession of the premises and mesne profits to be assessed. On December 18, 1922, the Master gave his certificate assessing the mesne profits at the sum of 841*l.*—a figure accepted by the defendant if the basis on which the assessment is to be made is that the mesne profits are to be calculated from the date of the first breach of covenant—that is to say, October 20, 1919. On the summons to review the Master's certificate, the learned judge limited the mesne profits to run from the date of the writ to that of possession given only, holding that down to the date of the writ the tenant was to be liable for the amount of the rent, and no more.

The point is thus raised—from what date does the plaintiff's right to mesne profits, that is to say, damages for trespass, begin? Does it run only from the date of the writ, or does it relate back to the date of the breach of covenant which gave rise, under the proviso, to the plaintiff's right to re-enter?

For the plaintiff it is contended that the breach relied upon is not a continuing breach; that the right to re-enter arose when the breach was committed; and that the breach is the foundation of his right to judgment for possession, and carries with it the right to mesne profits from that date. *Dunlop* v. *Macedo* (1) and *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.* (2), as well as a number of other authorities, to which the attention of Sargant J. had not been directed, were cited to support this view. During the course of the argument I was much impressed with the case presented on behalf of the plaintiff. The above authorities appeared to justify it, and to be in accord with the well-known proposition of law stated by Collins M.R. in the *Ocean Accident Case* (3), that "in an action of trespass, the right to sue, as against a wrongdoer, relates back after entry to

(1) 8 Times L. R. 43. (2) [1905] 2 K. B. 493.
(3) [1905] 2 K. B. 497, 498.

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the time at which the right to enter accrued, so as to give a right of action for trespass intermediate in point of time between the date of the right to enter and that of the actual entry." Further consideration and research have however led me to the conclusion that that principle does not apply to the present case, and that the judgment of the learned judge is right.

The terms of the proviso for re-entry under which the plaintiff's right accrued are as follows: "if there shall be any breach or non-observance of any of the lessee's covenants hereinbefore contained then and in any of the said cases it shall be lawful for the lessor at any time thereafter into and upon the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as in his former estate." But it is unnecessary to consider the precise words of, or construction to be placed upon the forfeiture clause, for in a long series of cases it has been determined that a provision that a lease shall be void on a breach of covenant or conditions by the lessee means that the lease is voidable only at the option of the lessor: see *Doe* v. *Bancks* (1) and *Davenport* v. *The Queen* (2), where the cases are fully considered, and also that the lessor must do some act evidencing his intention to enter for the forfeiture and to determine the lease: see *Roberts* v. *Davey* (3); *Doe* v. *Shawcross* (4); Cole on Ejectment, p. 408.

It was necessary therefore for the plaintiff in this case to take such a step in order to render his cause of action complete, and the issue of the writ is such a step: *Jones* v. *Carter*. (5)

But when the plaintiff's cause of action is thus completed, from what time do his rights accrue?

The question that had to be determined in *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.* (6) was, whether the second mortgagees were entitled to stand in the shoes

(1) (1821) 4 B. & Al. 401.
(2) (1877) 3 App. Cas. 115, 129.
(3) (1833) 4 B. & Ad. 664.
(4) 3 B. & C. 752, 756.
(5) 15 M. & W. 718.
(6) [1905] 2 K. B. 493.

of the mortgagor so as to found their claim against a trespasser who, as a wrongdoer, could not dispute their title. No doubt after entry there is a relation back to the actual title as against a wrongdoer, and in such a case a plaintiff can, as against a wrongdoer, maintain an action for trespasses committed before his entry: see *Barnett* v. *Earl of Guildford*. (1)

In the present case, however, the defendant was in possession under the lease, and was entitled to remain in possession unless and until some act was done by the lessor to put an end to the lease. The issue of the writ therefore was essential to alter the possession of the tenant. Until his voidable lease was determined he had a right to remain where he was. *Dunlop* v. *Macedo* (2) does not determine the question of relation back, for the mesne profits in fact allowed were only those accruing during the time elapsed since the plaintiff gave the defendant notice requiring the rent to be paid to him.

Under the old procedure the action of ejectment and the action of trespass for mesne profits were separate actions, and remained so until by the Common Law Procedure Act of 1852 a simpler procedure was introduced. By s. 214 of that Act, which is still in force, it was made possible for damages by way of mesne profits to be given upon the trial of an ejectment. The cases under the old procedure may however be looked at to ascertain whether mesne profits were recoverable from the earliest date at which the plaintiff's title accrued.

In *Aslin* v. *Parkin* (3) the opinion of the judges taken by Lord Mansfield declares that the judgment in ejectment proves nothing as to the length of time that the tenant has occupied—that the judgment does not relate back beyond the date of the demise laid in the ejectment proceedings, although in the same case it was definitely held that, whilst fictitious in form, the old ejectment action was really brought by the lessor of the plaintiff and "to force the parties to go to trial on the merits."

(1) 11 Ex. 19. (2) 8 Times L. R. 43.
(3) (1758) 2 Burr. 665, 667, 668.

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In *Compere* v. *Hicks* (1) a point analogous to the present was actually decided. It was an action of trespass for mesne profits. The plaintiff's title accrued on March 19, 1794, but was not perfected until he made an actual entry upon the premises on June 2, 1797. One of the questions that arose and was argued was whether the plaintiff was entitled to the mesne profits, from the time when his title first accrued, on the ground that by virtue of his entry the plaintiff's title related back to the time when it accrued, and it was said that it was unreasonable that the plaintiff should lose the rents and profits in the interval between the time when his right accrued and the subsequent entry. But it was held that the plaintiff could not be said to have been in possession before entry, and that he could not recover the mesne profits that accrued before that date, June 2, 1797. In *Pearse* v. *Coaker* (2), decided after the simpler procedure of the Common Law Procedure Acts had been introduced, in an action for mesne profits based upon a judgment by default in ejectment, it was held that they were recoverable only from the date of the writ in the action of ejectment down to the time that possession of the premises was obtained, and not for the earlier period during which the plaintiffs claimed title in the writ of ejectment. "It cannot be doubted," said Channell B. (3), "that a judgment, though by default, in ejectment is proof of title in an action for mesne profits, as from the day of the demise or the day named in the writ of ejectment. It did not, however, nor does not now, prove possession by the defendant for a corresponding period. . . . In the absence of any further evidence he (the plaintiff) would be entitled to a verdict indeed (for mesne profits), but not to damages from the day named in the writ as that on which the plaintiff had a right to eject."

These two cases appear to me to establish that the judgment in an action of ejectment—now an action for the recovery of land—does not, per se, relate back to the date when the plaintiff's title was laid or arose, and particularly where the defendant—the lessee—was not originally a trespasser or

(1) 7 T. R. 727. (2) L. R. 4 Ex. 92. (3) L. R. 4 Ex. 99, 100.

wrongdoer, and some act was necessary to found the plaintiff's right of action. Until that step was taken, the plaintiff's cause of action was not complete.

The observations of Tindal C.J. in *Hartshorne* v. *Watson* (1), and of Lord Denman C.J. in *Selby* v. *Brown* (2), point in the same direction, although by reason of the issues to be determined in those cases they cannot, in my judgment, be taken to be decisions upon the point.

Upon the authorities which I have referred to above, and for the reasons I have given, I am of opinion that the judgment of Sargant J. was right and that the appeal must be dismissed with costs.

WARRINGTON L.J. At the date of the issue of the writ in this action the defendant Boynton was tenant to the plaintiff under a lease which contained a covenant against subletting except by consent and a proviso for re-entry on breach of covenant. The defendant committed several breaches of the covenant, the first of which was the grant of an underlease dated October 20, 1919. The plaintiff did not discover any of these breaches until March, 1922, and on May 12, 1922, he issued his writ for recovery of possession of the land demised and for mesne profits. On June 25, 1922, he obtained judgment for possession and mesne profits to be assessed. A question being raised as to the date from which the mesne profits should be calculated, the defendant saying it should be from the date of the writ, and the plaintiff saying that it should be from the date of the first breach of covenant, Sargant J. has adopted the view of the defendant. The plaintiff appeals. It happens that the rent reserved by the lease is considerably lower than the present annual value, and the question, therefore, is of some importance to the parties. The proviso for re-entry is in the following form. [His Lordship read the proviso and continued:] It is well settled that according to its true construction such a proviso in the case of a breach of covenant renders the lease not void but voidable only at the option of the lessor:

(1) 4 Bing. N. C. 178, 182. (2) 7 Q. B. 620, 632.

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Arnsby v. *Woodward*. (1) It is also settled that the lease remains in force until some conclusive determination thereof by the lessor in the exercise of his option. In the present case such conclusive determination was effected by the issue of the writ, and the lease thereupon terminated. To use the words of Tindal C.J. in *Hartshorne* v. *Watson* (2): "The proper construction of this condition" (the condition of re-entry) "is, that from the time of re-entry, the lessor shall have the land as if the indenture had not been made: for the period previous to re-entry the lessee or assignee had it subject to the indenture." In the present case the issue of the writ is the equivalent of actual entry in the case cited.

Now damages by way of mesne profits are awarded in cases where the defendant has wrongfully withheld possession of the land from the plaintiff. According to the authorities I have cited, until the determination of the lease by the writ his possession was under the lease and was not wrongful, and for this period therefore no damages could be recovered, as there was no wrong. Damages can only be recovered as from the determination of the lease, whatever form it may take, whether by effluxion of time or by re-entry under a proviso for that purpose. So far I feel no difficulty in holding that the judgment of Sargant J. is correct.

But it is said that the re-entry when made relates back to the previous breach of covenant giving the right to re-enter, and thus enables the lessor to recover mesne profits as from the date of such breach, and I must therefore deal with that argument. In considering this part of the question it must be borne in mind that damages by way of mesne profits cannot be given for breach of the covenant not to underlet. Such a breach inflicts in most if not all cases no pecuniary wrong on the lessor, and its chief effect is to enable him to determine a lease which may be, and in the present case apparently is, of considerable value to the lessee. The damages are given for a different wrong altogether—namely, the withholding of possession after the determination of the lease, and this

(1) (1827) 6 B. & C. 519. (2) 4 Bing. N. C. 178, 182.

wrong was committed upon and not before the service of the writ. If then the doctrine of relation were resorted to in this case the result would be to turn into a wrongful act that which at the time it was done was no wrong at all— namely, the remaining in possession under and by virtue of the lease until it was determined by the lessor's election to avoid it. The case mainly relied upon by the appellant in support of his contention was that of the *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.* (1), and particularly the observations of Collins M.R. (2), but it must be remembered that in that case the doctrine of relation was resorted to for the purpose of establishing the right of a particular plaintiff (in that case a mortgagee who had not come into actual possession till after the commission of the wrong sued upon) to recover damages for that which was unquestionably a wrongful act, and not for the purpose of converting into a wrong an act which was rightful at the time it was done. In this as in every other case the judgment of the Master of the Rolls must be read in conjunction with the facts and circumstances with which he was dealing, and, so read, the judgment lends no support to the appellant's argument. In fact in *Tharpe* v. *Stallwood* (3), one of the cases discussed and acted on by the Master of the Rolls, Coltman J. begins his judgment in favour of applying the doctrine of relation in that case by saying: "There are various authorities to show that a man shall not be made a trespasser by relation in respect of an act which was lawful at the time." No authority has been cited which is inconsistent with this statement, and I do not believe any can be found. In my opinion, therefore, in the present case the doctrine of relation cannot be resorted to so as to antedate the wrongful possession of the defendant, and make it begin with the original breach of covenant. As to the argument founded on the practice in an action for mesne profits following on a judgment in an action of ejectment under the old system, under which practice damages were given as from the date of the demise

(1) [1905] 2 K. B. 493. (2) [1905] 2 K. B. 499.
(3) 5 Man. & G. 760, 774.

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to the plaintiff, which might be laid as of date anterior to the declaration, the practice appears to be founded on an estoppel by reason of which the defendant could not deny the facts alleged as to the demise, the entry thereunder, and the ouster, and, in my opinion, such practice has no application at the present day. Moreover it may be that the demise to the plaintiff, which had to be taken as admitted, may have been in itself a final election by the lessor to avoid the subsisting lease, as being an act inconsistent with its continuance. At any rate no successful argument in such a case as the present can, in my opinion, be founded on the practice in actions long since abolished.

I think the judgment of Sargant J. was right, and the appeal must be dismissed with costs.

ASTBURY J. I agree. Mesne profits, being damages for trespass, can only be claimed, in a case like the present, as from the date when the defendant ceased to hold the demised premises as tenant under the lease.

Under the proviso for re-entry in the present demise, the plaintiff's right to re-enter and determine the lease arose on his doing an unequivocal act, after the lessees' breach of covenant, evidencing his intention to take advantage of the proviso, which act in the present case was the issue of the writ. Before this date the defendant was in possession under the lease, and was in no sense a trespasser.

The appellant contends that mesne profits are recoverable from the date of the lessees' breach of covenant as being the date when the right of re-entry first arose, this contention being based on the well-known doctrine of relation back. With the exception of *Terrell* v. *Chatterton* (1), in which the order in the Court of Appeal, qua relation back, was drawn up per incuriam and altered in the House of Lords, no authority has been found or principle referred to justifying, in my opinion, any such proposition, the authorities cited all being cases where the defendant was an admitted trespasser at the antecedent date, and the doctrine of relation back

(1) [1922] 2 Ch. 647; [1923] A. C. 578.

was relied on, on and in consequence of the subsequent establishment of a sufficient title in the plaintiff to maintain his suit.

No application of the well-known doctrine of relation back can, for the purpose of extending a claim for trespass, turn a lawful into an unlawful possession.

A plaintiff in ejectment is now entitled to recover damages, in a proper case, for any period over which he can prove a right to possession; but when the defendant in possession is not a trespasser at all until his title is made void, as, for instance, by entry or by writ, mesne profits can only be recovered as from such latter date.

In my opinion the judgment of the learned judge in the Court below was right in every particular, and I have only added a short expression of my own opinion out of respect to the able arguments which have been addressed to this Court.

Appeal dismissed.

Solicitors for appellant: *Williams & James.*
Solicitors for respondent: *Boulton, Sons & Sandeman.*

W. I. C.

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Dec. 6, 7, 20.

SWAN *v.* SINCLAIR.

[1922. S. 5019.]

Easement—Right of Way—Express Grant—Non-user—Acquiescence in Obstructions to Way—Abandonment.

In 1871, houses and shops in Essex Road, Islington, were put up for sale at auction in eleven lots. One of the conditions was that a strip of land 15 ft. in width running the entire length of the lots and being the rear portions of the back gardens of the houses should be formed into a roadway, and that the lots were sold subject to and with the benefit of a right of way from the back garden of each house along the proposed roadway into Church Road, which bounded the side of lot 1, on the south-west, and that the respective purchasers should as soon as possible remove the garden fences and form the roadway. In each of the original conveyances to the purchasers of lots 1, 2, and 3 that condition was recited; and lot 1 was conveyed subject to the right of way of the owners of the other lots, and lots 2 and 3 were each conveyed with the benefit of and subject to the right of way as in the condition mentioned; and in each of the conveyances the obligation was cast upon the purchaser to contribute towards the expense of forming the road. In the subsequent title deeds relating to the plaintiff's and the defendant's properties the existence of the right of way was expressly mentioned. In 1873, the purchaser of lot 1 granted a lease thereof to the plaintiff's father for fifty years (which expired on June 24, 1922) subject to the right of way, and the lessee covenanted to keep the site of the roadway in good repair and to contribute towards keeping it in repair and erecting and maintaining gates at the entrance of the roadway into Church Road. On July 25, 1904, that lease was assigned to the plaintiff subject to the right of way of the owners of the other lots. In 1911, the plaintiff purchased and had conveyed to him in fee simple lots 2 and 3, subject to and with the benefit of the right of way. It appeared that at the time of the sale in 1871 the several lots were divided from one another by fences of some kind which extended across the 15 feet strip and that a brick wall separated lot 1 (including the end of the strip) from Church Road. It also appeared that from 1871 to 1922 the roadway was physically incapable of being used as such, owing to its site never having been formed into a road and having been allowed to remain obstructed by the dividing fences, and further that, with the tacit acquiescence of the owners for the time being of the several lots, the condition of the site of the proposed roadway had never been altered throughout that period, and that the plaintiff himself did nothing from 1911 to 1922 to assert his rights. In 1883 the plaintiff's father, by levelling up part of the site of lot 1, caused a sheer drop of 6 ft. to occur on the strip between that lot and the adjoining lot 2. About the year 1919, the plaintiff, in anticipation of the expiration of his lease in June, 1922, entertained a scheme of building a garage on the site of lots 2 and 3 and to use the strip as a roadway from the same into Church Road,

and with that object in view he pulled down part of the wall which had, since 1871, separated the end of the strip from Church Road and erected gates there. Shortly after the expiration of the lease, the defendant, who was entitled to the freehold of lot 1, challenged the plaintiff's right by erecting a wall across the site of the roadway between lot 1 and lot 2. The plaintiff, accordingly, commenced this action, in which he sought a declaration that he was entitled, as the owner of lots 2 and 3, to a general right of way along the site of the proposed roadway at the rear, and forming part of lot 1, into Church Road, and for an injunction:—

Held (by Warrington and Sargant L.JJ., Pollock M.R. dissenting), that although the mere non-user of the right of way was not conclusive evidence of its abandonment, yet having regard to the facts above stated and the conduct of the plaintiff and his predecessors in title there was sufficient evidence of the abandonment of the right of way in question.

Ward v. *Ward* (1852) 7 Ex. 838 distinguished.

Decision of P. O. Lawrence J. affirmed.

APPEAL from the decision of P. O. Lawrence J.

The following statement of facts is taken from the written judgment of Warrington L.J.: "The plaintiff in this action claims a right of carriage way over adjoining property of the defendant as appurtenant to his property. That the right of way was originally created by express grant is not disputed; the defence is that it has been abandoned, and is therefore no longer exercisable. This defence has been upheld by P. O. Lawrence J., and the plaintiff appeals.

"The property of the parties consists of a continuous row of houses Nos. 314A, 316, 318, 320, and 322, on the east side of Essex Road, Islington (treating that road as running north and south). The defendant's houses are 314A, 316, and 318, the plaintiff's are 320 and 322. No. 314A is at the north corner of a cross street called Church Road, running east and west. Like most houses in the suburbs of London these houses have back yards or gardens bounded on the end furthest from Essex Road by a cross wall running nearly at right angles to Church Road, and separated from each other by boundary walls or fences. The road claimed is over a strip 15 ft. wide (being the easternmost portion of the defendant's garden) to and from Church Road, from and to the back part of the plaintiff's house.

"In 1870 the entire row of houses from 316 to 338 inclusive (what is now 314A then formed part of 316) were the property

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of certain trustees and their mortgagees, and in October of that year they were put up for sale in eleven lots. In the particulars of sale it was stated that the part coloured brown in the plan thereto annexed was intended to form a right of way from the back gardens of each house into the Church Road, and that the lots would be sold subject to, and with the benefit of such right of way, and that the pieces of ground marked brown on the said plan of the width of 15 ft. at the rear or bottom of the back gardens of each lot, one to ten inclusive would be included in the purchase of each of those lots both subject to a right of carriage way to the owner of lot 11, and each of the other lots through and over the same, and into Church Road, but that such right of way would only belong to the respective purchasers on the determination of the existing tenancies, and that for that purpose each purchaser, except the purchaser of lot 3, which was vacant, would have to determine at the earliest possible period the tenancy of the lot purchased by him, and the respective purchasers, on the completion of their respective purchases to forthwith, at the earliest possible period consistent with the determination of the existing tenancies, remove the 15 ft. of end garden wall, and form the before-mentioned right of way. Why the vendors imposed the above-mentioned terms on the purchasers does not appear; presumably their motive was some expectation of increased prices from all the purchasers, except the purchaser of lot 1, which would become the one wholly servient tenement. At any rate, the scheme appears to have been that of the vendors only. Lot 1—which is now the defendant's property—was sold to one James Jay, the conveyance being dated February 3, 1871. It was conveyed to him in fee simple 'subject as hereinbefore mentioned or referred to,' the reference being to the statement as to the right of way set forth above. The houses comprised in the lot were subject to yearly tenancies only, and they were, in fact, determined prior to October, 1875.

"By a deed dated October 21, 1873, Jay demised the premises purchased by him to William George Swan, the

father of the plaintiff, for fifty years from June 24, 1872. The lessee entered into certain covenants in reference to the maintenance, repair, and so forth, of the site of the intended roadway, and the making of a proper gate therefrom into Church Road, and otherwise, the chief anxiety of the lessor being, apparently, that the road should not become a public one. In 1904 this lease was assigned to the plaintiff by his father's executors, and it expired on June 24, 1922, whereupon the plaintiff gave up possession thereof to the defendant who had become entitled thereto in the year 1895, as specific devisee under the will of James Jay.

"Lot 2 (No. 320) was bought by James Frederick Corben, and conveyed to him by deed dated February 2, 1871, and shortly afterwards—namely, by a deed dated April 12, 1871, conveyed by him to John Edwin Corben. Lot 3 (No. 322) was bought by and conveyed to John Edwin Corben by a deed dated February 2, 1871. In the conveyance of both these lots the scheme above mentioned was stated, the land was conveyed together with the right of way over the proposed servient tenements, and subject to the right of way so far as the lot in question was intended itself to be a servient tenement.

"In 1911 Nos. 320 and 322 were purchased by the plaintiff, and the land was conveyed with the benefit of the right of way over Nos. 316 and 318—apparently including 314A, under the former number—and subject to the right of way for the owners of Nos. 324–338 inclusive. This conveyance, no doubt, as between the parties to it treated the right of way as still subsisting, but it is, of course, not evidence against the defendant who was neither party nor privy to it.

"From 1871 to 1922 no single owner of any of the houses comprised in the sale above mentioned has used the intended right of way, nor have any of the cross walls or fences separating the several back gardens been permanently removed. In particular, a 6-ft. brick wall separating the back garden of 318 from that of 320 was allowed to remain, as was also a similar wall separating the back garden of 316 from Church Road. The continuance of these walls was an

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infringement of the obligation cast on the purchaser of the two lots by the scheme, and by his conveyance, but no objection thereto was made by the predecessors of the plaintiff, or by any of the other persons interested in the maintenance of the rights of way.

"In 1883 the plaintiff's father, the lessee under the lease of 1873, built some stables and coach-houses on a vacant piece of his ground adjoining the site of the proposed right of way, and opened a gate from such vacant ground into Church Road. He, at the same time, raised the level of, apparently, the site of the stables, and of the 15-ft. strip to the top of the 6-ft. wall already referred to. The result was that anyone passing from No. 318 over the 15-ft. strip would have had to surmount a 6-ft. bank of earth held up by a brick retaining wall. The filling up of the space behind this wall seems to me to indicate a definite intention on the part of the predecessors of the defendant to render impassable the 15 ft. strip for an indefinite period (probably on the presumption that the road was, even then, abandoned) as a fresh obstruction. This considerably strengthens the effect of the continuance without objection of the previous obstructions as a circumstance tending to the inference of abandonment. The plaintiff made no use of the right of way, nor did he take any steps to make it possible to do so until a few days before the expiration of the lease of 1873, when, after demolishing the boundary wall, to some extent levelling the ground behind it, and making an opening in the wall bordering Church Road he drove a motor car from that road to the back of 320 and 322, where, as he says, he intended to make a garage. At this time he was in possession of both servient and dominant tenements. The lease having expired on June 24, 1922, he commenced this action on October 20, with the object, no doubt, if successful, of carrying into effect the intention just referred to."

The action was tried before P. O. Lawrence J. on October 25, 1923, who dismissed the action. In the course of his judgment His Lordship said that it was well settled that mere non-user did not amount to abandonment: see

Ward v. *Ward*. (1) That case was distinguishable on the facts: there, the right of way claimed was over a formed road which was never obstructed, while in the present case, from 1871, for a period of fifty years, the roadway was never formed and its site remained obstructed by numerous fences across it and by the brick wall across the end of it where it abutted upon Church Road: in short, there was no road over which the right could ever have been exercised. That state of things was acquiesced in by the plaintiff and his predecessors in title and by the other persons interested during the whole of that period. His Lordship held that from those facts the inference must be drawn that the right of way had been abandoned long before the plaintiff asserted his right in 1922. Further, the levelling up of the land in 1883, by the tenant of the servient tenement, and the fencing of that tenement from the adjoining dominant tenement acquiesced in by the dominant owner were acts inconsistent with and adverse to the exercise of the right of way claimed.

The plaintiff appealed. The appeal was heard on December 6 and 7, 1923.

Jenkins K.C. and *J. E. Harman* for the appellant. It is not disputed that the authorities have established that a private right of way, if proved to have existed, is never lost by mere non-user: *Ward* v. *Ward*. (1) There must be something more, some definite act on the part of the dominant owner, to constitute abandonment; as, where a man, entitled to ancient lights in respect of a house, pulls down the house and rebuilds it with a blank wall. Here the site of the roadway has remained (from the appellant's point of view) in exactly the same state as it was in 1871. There has been no alteration in it and no act done on it amounting to a negation of the right during the whole of that period. Every document in the case recognizes and keeps alive the right of way. The respondent has not attempted to give any date at which he alleges it was abandoned. It is submitted that

(1) 7 Ex. 838.

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the levelling up in 1883 of the land at the rear of Nos. 316 and 318 was not so much an act of obstruction of the way as of improvement of that portion of the site of the roadway: *James* v. *Stevenson*. (1) It would not be difficult, if the roadway should be required from No. 320, to slope it up to Church Road.

The facts in this case are somewhat unusual. In most of the reported cases there has been some user, and it has been desired to resume it. There is no case which decides that where a right of way has been granted by deed it must be abandoned by deed. Here the grant was by deed, and was made on the footing that something was to be done by the grantees. The purchasers were under an obligation to remove the walls on their respective strips. The scheme for the right of way originated with the vendor and not with the purchasers. Nothing was done to carry out that scheme, and the inference therefore is that the purchasers at that time did not want to use the right of way. The scheme was merely left in abeyance with the tacit consent of the dominant owners. The premises in question were occupied as shops, and the right of way would only be required if the property at the rear was subsequently developed. In 1919, for the first time, one of the occupiers wanted the right of way, because he wished to develop his property.

[WARRINGTON L.J. The obstruction was put there so long ago as 1883.

POLLOCK M.R. I think the judge was right in not attaching any signal importance to what was done in 1883.]

As to the authorities, *Moore* v. *Rawson* (2) was a case of obstruction of ancient lights. There the plaintiff had pulled down a house containing ancient lights and had erected on its site a stable with a blank wall, and it was held that by so doing he had evinced an intention to abandon his ancient lights. There a definite act was done on the dominant tenement.

(1) [1893] A. C. 162.

(2) (1824) 3 B. & C. 332.

[WARRINGTON L.J. Bayley J.'s judgment in that case cannot be applied to the case of a right of way.]

In *Reg.* v. *Chorley* (1) the Court expressed the view that it was not so much the length of time during which there had been non-user, as the conduct of the grantee of the easement. The length of the non-user was held to be only one of the elements from which the grantee's intention to retain or abandon the right might be inferred.

In *Ward* v. *Ward* (2) the owner of a right of way, having a more convenient way of his own, had not used his right of way, and it was held that he had not lost it by mere non-user.

In *Cook* v. *Bath Corporation* (3) a door in a wall had remained locked for forty years, yet it was held that there was a continuing right all that time, as the defendant had not acquired any adverse right which would be prejudiced by the renewed exercise of the plaintiff's right.

[POLLOCK M.R. The Vice-Chancellor there treats *Ward* v. *Ward* (2) as laying down the principles applicable.]

Owen Thompson K.C. and *R. M. Pattisson* for the respondent. This is a case of some novelty. The decision in *Ward* v. *Ward* (2) may be accepted as correct in the circumstances of that case. But that decision was misinterpreted by Malins V.-C. in the more recent case of *Cook* v. *Bath Corporation* (3), and used in a way which was not justified. It is now well established that in such circumstances as those in *Ward* v. *Ward* (2) mere non-user is not a fact from which abandonment of the right can be inferred. Regard must be had to the state of facts existing at the date when the grant was made, and if at that date the right could not physically be exercised and nothing has subsequently been done to render its exercise possible, the grantee cannot be heard to say some forty or fifty years after its creation that he has not abandoned it. The dicta in the judgments in *Crossley & Sons, Ld.* v. *Lightowler* (4) have an important bearing on this point.

(1) (1848) 12 Q. B. 515.
(2) 7 Ex. 838.
(3) (1868) L. R. 6 Eq. 177.
(4) (1867) L. R. 2 Ch. 478.

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The question whether or not there has been an abandonment of a right of way may be illustrated by the following examples. 1. If my neighbour grants me a right of way over his garden through a gate in his wall and I have a more convenient way of my own, I do not lose the right by mere non-user: *Ward* v. *Ward*. (1) If my neighbour grants me a right of way over his garden through his gate to the highway and then locks the gate against me I lose the right if I do not take steps within a reasonable time to assert it: *Reg.* v. *Chorley*. (2) If my neighbour has a wall between my garden and his, and grants me a right of way over his garden, and undertakes to make a gate in the wall to enable me to exercise it but does not do so, the fact that he has not done so is a material element in considering whether after the lapse of fifty years I have not abandoned the right.

The principle on which the Court acts in cases of implied abandonment and implied grant is the same—namely, it will presume the execution of such documents as will account for the position of the parties at the material date: *Doe* v. *Hilder*. (3)

It is contended that the title of the appellant as appearing on the documents is complete, but that does not affect the question if the owner of the servient tenement is not a party to them.

It is submitted that the true inference to be deduced from the facts in this case is that the appellant and his predecessors in title long ago abandoned their rights.

Jenkins K.C. in reply. The peculiarity which distinguishes the present case from ordinary cases is that it is not one of user followed by cesser or one in which user could be had without some preliminary work. Mere delay in the assertion of the right is irrelevant, unless it has induced the defendant to act to his prejudice, which is not here suggested. The scheme for the right of way was left in abeyance. It is clear that at the time of the grant the purchasers did not require the right. They merely slept

(1) 7 Ex. 838. (2) 12 Q. B. 515.
(3) (1819) 2 B. & Al. 782, 791.

upon their right. But that was not sufficient to deprive them of it.

[He referred to Goddard on Easements, 7th ed., pp. 564, 565.]

Cur. adv. vult.

Dec. 20. The following judgments were delivered :—

POLLOCK M.R. This is an appeal from a judgment of P. O. Lawrence J. in an action in which the plaintiff claimed a general right of way to Church Road, Islington, as existing at the back of certain premises abutting on Essex Road, Islington. P. O. Lawrence J. gave judgment for the defendant on the claim with costs, and for the defendant on the counterclaim for a sum of 20*l.*, with costs, in respect of certain acts of trespass committed by the plaintiff to the premises of the defendant in the furtherance of his exercise of the right of way which he claimed.

Abutting on Essex Road there are a number of houses with forecourts—now in some cases turned into shops—numbered from the furthest point in Essex Road to the corner where Church Road joins it, in even numbers 338 to 316, or, as the latter number is now known, 316 and 314A. At the rear of these premises there are open spaces allotted as gardens to each house. In 1871 it was the intention to create a roadway common to these houses giving access from their gardens to Church Road. No. 338 was the first dominant tenement, and the lower numbers were in succession dominant tenements over the premises lying successively nearer to Church Road, and over the premises of 316 and 314A, which numbers abutted on Church Road, and were in themselves entirely servient tenements—the intervening premises having successively dominant rights over the premises lying nearer to Church Road, and being servient premises in respect of the roadway which passed through them from the dominant premises lying further from Church Road, and nearer to No. 338, at which the right to the roadway began.

The plaintiff's title arises from a conveyance dated

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February 2, 1871, of No. 322 Essex Road by Daniel Thomas Sharp to James Frederick Corben, and a conveyance of the same date by Sharp to John Edwin Corben, of No. 320 Essex Road. By a conveyance dated April 12, 1871, James Frederick Corben conveyed No. 322 to John Edwin Corben, so that from this latter date John Edwin Corben became, and was the owner in fee, of both 322 and 320 Essex Road.

Those conveyances of February 2, 1871, were made subject to a condition that a strip of land at the end of the garden remote from Essex Road, 15 ft. in width, was intended to form a right of way for the owners of the other houses as expressed above, and that similar pieces at the ends of the gardens of the other houses should be subject to a right of carriage way, and the condition was imposed: "that the respective purchasers were, on the completion of their respective purchases, to forthwith, at the earliest possible period consistent with the determination of the existing tenancies"—which were of not more duration than yearly tenancies—"remove the 15 ft. of end garden wall, and form the before mentioned right of way."

At that time the strips of 15 ft. at the end of the gardens were divided from each other by fences or walls which ran back from the direction of Essex Road roughly parallel with Church Road, and formed the demarcation of the garden premises belonging to each house.

On May 19, 1909, J. E. Corben granted a lease for three years of No. 322 with the said right of way from March 25, 1909, to George F. Davis and Ernest James Greenland, subject to the covenant that "the lessees would, at their own expense within one month after being required to do so by the lessor his heirs or assigns, erect or build with new materials, and in the best manner at the rear of the said demised premises, a wall nine inches thick, six feet high, to divide the same from the said piece of land 15 feet in depth which is intended to be taken off from the said garden to form a roadway, and is not included in this demise, and make and form the said roadway in a proper manner."

On March 7, 1911, John Edwin Corben died, and on

August 11, 1911, his representatives conveyed Nos. 320 and 322 to the plaintiff, together with the said right of carriage way as before described. From and after August 11, 1911, therefore, the plaintiff has been the freeholder of the premises, No. 320, which adjoin and abut upon the defendant's premises, which are No. 318, No. 316 and No. 314A.

The defendant derives his title from a conveyance dated February 3, 1871, to James Jay, of No. 318 and No. 316, Essex Road, now represented, as already stated, by Nos. 318, 316, and 314A, which contains similar conditions to those already stated in the conveyances dated February 2, 1871, to the two Corbens.

On October 21, 1873, Jay granted a lease of Nos. 318, 316, and 314A for fifty years to W. G. Swan, the father of the plaintiff, which lease expired on June 24, 1922, "subject to a right of way for the owners, tenants and occupiers of the messuages, shops, and premises, known as 320-338 in common with the lessees in over and along the portion of the garden in the rear of the demised premises as is coloured brown on the said plan." That is to say, the same strip referred to in the conveyances of February 2 and 3, 1871.

In 1903 W. G. Swan died, and on July 28, 1904, the remainder of the term of fifty years was assigned to the plaintiff. Thus from 1911 to 1922 there was unity of possession of the premises Nos. 322, 320, 318, 316, and 314A in the plaintiff, though not unity of seisin.

The paper title of the plaintiff is thus complete, and in all the documents is to be found a reference to the right of way. Although the terms of the lease of May 19, 1909, and the conveyance to the plaintiff are not evidence against the defendant, there is no part of them from which an intention to abandon the right of way could be inferred as against the plaintiff, or his predecessor.

In 1883 the father of the plaintiff, W. G. Swan, being then in possession of the premises Nos. 318–314A, under the lease of 1873, built some stables on a site which left free the 15 ft. at the end of the garden. It was necessary to excavate

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the foundations, and the soil from them was deposited on the surrounding vacant ground, including the 15-ft. strip; thus bringing the site of the premises held under the lease more nearly and conveniently to the level of Church Road. The result of this was that the strip of land reserved for the roadway was raised nearly 6 ft., and up to and against the wall dividing No. 318 from No. 320 the land was raised accordingly, and the wall, which had been merely a dividing wall, became a retaining wall. If it had been decided to build the road, it would have been necessary to regrade the level, and a considerable portion of the soil added to the 15-ft. strip would have had to be moved so as to make the access to Church Road from No. 320 possible and gradual.

It is argued that the deposit of this soil on the strip amounted to a challenge to the then owner of No. 320, such as to have impelled him to activity in the assertion of his rights, and that, as J. E. Corben did not take proceedings to claim his roadway, it must be taken that it was definitely and finally abandoned.

Non-user is not by itself conclusive evidence that a private right of easement is abandoned. The non-user must be considered with, and may be explained by, the surrounding circumstances. If those circumstances clearly indicate an intention of not resuming the user then a presumption of a release of the easement will, in general, be implied and the easement will be lost.

The question must in many cases be difficult to decide; but it appears clear that something more than non-user, some more definite indication of a release is required. "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption" (see Alderson B. in *Ward* v. *Ward*. (1)) "The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user." See also per Lord Chelmsford in *Crossley & Sons, Ld.* v. *Lightowler* (2), where he quotes with approval the judgment of the Court in

(1) 7 Ex. 838, 839. (2) L. R. 2 Ch. 478, 482.

Reg. v. *Chorley* (1), particularly the words of Lord Denman C.J., who delivered the judgment of the Court: "The cesser of use coupled with any act clearly indicative of an intention to abandon the right would have the same effect (i.e. of release) without any reference to time."

In the present case the roadway has never been made. The strips intended for it at the back end of the gardens of each of the houses have remained in the same state as they were in 1873, which was approximately the due date for the making of the roadway, except the strip belonging to No. 318, which was levelled up as already stated. It would seem as if circumstances had induced upon all the owners a common delay in making any attempt to complete the roadway. It may be that till recently the sites to which it would give access were not ripe for user, that the development anticipated in 1871 had not matured.

There has, it is said, been a non-user. Has there been any act, in addition, so as to fulfil the rule laid down in the cases cited, and to justify the inference of a release? The acts done upon No. 318 when the stables were built are claimed to be acts adverse to the user, and so to have challenged the predecessor in title of the plaintiff, J. E. Corben, to assert his rights. The learned judge states that he does not so much rely upon what happened in 1883. I agree with him. It seems to me that Corben in 1883 might have reasonably hesitated to attempt to assert his rights against his neighbour, in respect of what that neighbour was doing on the other side of the wall that divided their properties. No attempt, general or singular, had at that time been made to create the roadway. To hold that mere non-activity to interfere at that time on the part of Corben is "clearly indicative of an intention to abandon the right" (see *Reg.* v. *Chorley* (1), would, in my judgment, go far beyond the inference that can be reasonably made. In 1883 the roadway was not in being. There could be no cesser of user, nor any act of actual abandonment or release.

At most Corben's inaction, or passivity, amounted to a

(1) 12 Q. B. 515, 519.

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decision not to claim, at that time, to assert a right which was not interfered with and not to attempt to restrain acts which were not conclusively fatal to the making of the roadway—acts which in one aspect might be said not even to be an impediment to it; for the soil accumulated on No. 318 would have served for the roadway if made its full length, to ease the gradient on its outlet to Church Road.

For these reasons I am not able to attach the importance required to what happened in 1883. Without an inference of a release arising from those events, there remains mere inactivity common to all concerned, and that is not, in my opinion, sufficient to justify an inference of abandonment of his rights by the predecessor of the plaintiff. On these grounds my judgment differs from that of the learned judge who tried the case, and I would allow the appeal; but as my colleagues take a different view, and agree with P. O. Lawrence J., the appeal will be dismissed with costs.

WARRINGTON L.J. stated the facts as above set out and continued: The question is: What is the proper inference to be drawn from these facts? The law is, I believe, correctly stated by Alderson B. in *Ward* v. *Ward*. (1) He says: "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user." In the case then before the Court the right of way had already been acquired before the non-user which was relied upon as evidence of abandonment, and I do not think it can make any difference that in that case it does not appear that there had been an express grant. There was there no circumstance adverse to the user, which had not taken place simply because the owner of the dominant tenement had, during part of the period of non-user, been himself in possession of the servient tenement, and during the twenty-seven years last before suit the tenant of the dominant tenement had land of his own

(1) 7 Ex. 838, 839.

which gave him a better access than did the right of way. Under these circumstances the Court held that the verdict affirming, in effect, the abandonment of the right of way must be set aside. In the present case the user of the road has been rendered impossible by not only the continuance of obstructions existing at the date of the grant, but also by the creation of a fresh one by the raising, in 1883, of the level of the land over which the way would pass. It seems to me that these circumstances, adverse to user, and sufficient in themselves to explain the non-user, combined with the great length of time during which no objection has been made to their continuance, nor effort made to remove them, are sufficient to raise the presumption that the right has been abandoned, and has now ceased to exist. It is contended that we ought to hold that the right was merely in abeyance, and could at any time be revived when occasion arose. I cannot myself see anything in the circumstances to suggest that the owners of the dominant tenement contemplated a future use of the way, and if they had done so I think they ought to have made their position clear. I believe the truth to be that the common right of way emanating, as it did, not from the owners of the several houses themselves, but from the vendor to them, was found by the parties really interested not to be wanted, and the scheme was therefore given up.

I think the appeal fails, and must be dismissed with costs.

SARGANT L.J. The right of way claimed in this action originates in a scheme of development arranged by the common vendor on the sale by auction of a number of adjoining houses. These houses were twelve in number, fronted on the south-east side of the Essex Road, Islington, and were numbered from 316 to 338 (even numbers) inclusive. No. 316 was at the corner of a road called Church Road running from the Essex Road in a south-easterly direction, and that house, and the adjoining house, No. 318, formed lot 1 at the sale. The other houses were sold singly, and formed lots 2 to 11 inclusive.

The houses had small back gardens, and the conditions of

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sale at the auction provided that a strip of land 15 ft. in depth at the end of each of these gardens should be used to form a common back road (or what was somewhat loosely called a right of way) to all the houses, and that the respective purchasers should, at the earliest possible period consistent with the existence of the existing tenancies, remove the 15 ft. of each garden wall, and form the before-mentioned right of way. No. 322 Essex Road (being lot 3) was vacant, and all the other lots were subject to annual tenancies only; and, accordingly, the obligation to remove the 15 ft. of wall, and to form the back road, or right of way, became effective before the end of the year 1872 at latest.

The conveyances of the various lots, or at all events of lots 1, 2 and 3, to which the present action relates, recited the conditions of sale as hereinbefore stated, and were effected in accordance therewith. Lot 1, being Nos. 316 and 318, was conveyed to one James Jay, subject to rights of way in favour of the other lots; lot 2, being No. 320, was conveyed to James Frederick Corben, with its right of way over lot 1, but subject to rights of way in favour of the nine lots to the north-east of lot 2, and lot 3, being No. 322, was conveyed to John Edwin Corben, with its right of way over lots 1 and 2, but subject to rights of way in favour of the eight lots to the north-east of lot 3. Within a few months of his conveyance James Frederick Corben conveyed lot 2 to James Edwin Corben, and since that time lots 2 and 3 have been in the same ownership.

It is, perhaps, of some importance to notice that under the conditions of sale which have been referred to any positive obligation cast on the purchasers of the various lots, even as towards the vendor, was only to remove 15 ft. of wall, and to leave the requisite space for the intended back way, and did not extend to the construction or metalling of a road, or the engineering of it, so as to form a convenient or practicable access for persons or vehicles to Church Road; and this was a point of substance, for it appears that the back gardens of the lots had, and have, a definite slope downwards to the south-east, while Church Road has been

made up more or less level with Essex Road; so that, where the proposed new back road was to meet Church Road at the southern corner of lot 1, Church Road was some 5 or 6 ft. higher than the site of the proposed new road. In order, therefore, to make the new road practically available as an access from Church Road to the backs of the various lots, it would have been necessary to carry it from Church Road by a more or less gradual slope. But, as already stated, no provision seems to have been made in the conditions of sale as to the levels of any such slope, or as to the apportionment of the expenses of constructing the slope and metalling the road between the various purchasers of the lots.

Whether on account of this omission, or because the purchasers of the various lots attached little importance to the proposed access to their lots at the back, or for some other reason, nothing effective was ever done by the purchasers of the various lots to carry out the proposal for the new back road. At one time 15 ft. of the walls of Nos. 324 and 326 appear to have been pulled down, but to have been replaced by wooden hoardings; and the wall between No. 322 and No. 320 was also pulled down, probably for more than the 15 ft., since the two houses were in the common ownership and, apparently, occupation of James Edwin Corben. But the wall between No. 320 and No. 318, that is between lot 2 and lot 1, and the wall separating lot 1 from Church Road, which are the two important walls, were left extending right across the 15-ft. strip which should have formed the common access to Church Road; and, accordingly, there has throughout been, as regards lot 1 in relation to lots 2 and 3, and as regards those lots in relation to lots 4, 5, and so on, continued physical obstructions which necessarily prevented any actual exercise of rights of way and passage to and from Church Road.

Further, in the year 1883 an alteration was made in lot 1 which increased the physical difficulties from lots 2 and 3 (and, incidentally, from the other lots) into Church Road. In the year 1873 James Jay, the purchaser of lot 1, had leased it to one William George Swan for a term of fifty years

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in consideration of buildings and improvements effected by the lessee, which included the formation, or improvement, of three houses on the lot (now known as 314A, 316 and 318 Essex Road), and which left at the rear of the yards of these three houses a vacant piece of land some 45 ft. in depth, apart from the 15 ft. strip, for the intended back road; and in the year 1883 William George Swan—no doubt with the knowledge and consent of his lessor—filled up this vacant land so as to bring it to the level of Church Road, and built stables thereon; and also filled up to a corresponding height the 15-ft. road strip so as to enable it to be concurrently used in conjunction with the stables. And the result of these operations was that there was from that time forward a solid bank of earth along the 15 ft. at the rear of lot 1, with a perpendicular drop of some 5 or 6 ft. between the site of the intended road on lot 1, and the site thereof on lot 2. It is obvious that the existence of this solid block of earth added considerably to the difficulties in the way of forming any practicable access to Church Road from the other lots, and particularly from lots 2 and 3, in view of the fact of the steepness of any slope that could be formed within the limits of those two lots. But there is no record whatever of any protest against this alteration having been made by the owner of lots 2 and 3. So far as is known, he remained absolutely quiescent, though the addition of this further obstruction must obviously have been apparent to him.

John Edwin Corben died in the year 1911, and in the same year his executrix sold Nos. 320 and 322 Essex Road to the plaintiff, and conveyed it to him by an indenture dated August 11, 1911. The plaintiff had already—namely, on July 25, 1904, become the assignee of the residue of the fifty years' lease of Nos. 314A 316, and 318 Essex Road, so that from this time forward what had been intended in 1871 to be constituted inter se the dominant tenement—namely, lots 2 and 3, and the servient tenement lot 1, became in the same occupation; and they remained so until the expiration of the plaintiff's lease on June 24, 1922. In the last two or three years of that lease there were several acts

done by the plaintiff which indicated, more or less distinctly, a wish or intention on his part ultimately to develop Nos. 320 and 322 in such a way as to avail himself of an access thereto over the 15 ft. at the rear of lot 1. In or about the year 1919 or 1920 he disposed of a quantity of material accumulated for another purpose on part of lot 1 by shooting it over into the back of Nos. 320 and 322, so as to form a rough slope some 10 ft. broad into the backs of those houses. Again, about the same time, he got out plans for the erection of a double garage at the rear of Nos. 320 and 322, though he did not proceed with the work, because he found the cost of erection was too high at that time; and within about ten days of the expiration of the lease he proceeded to assert his right of way to Nos. 320 and 322 by knocking down some 15 ft. of the boundary wall along Church Road, placing iron gates with pillars there, and causing a motor car to be driven through these gates across the rear of lot 1, and, at some apparent risk, down the rough slope into Nos. 320 and 322. But I attach no importance to these somewhat belated activities on the part of the plaintiff. The question that has to be faced is this: Had there been, by the end of the year 1918, or, indeed, by the date of the conveyance to the plaintiff in the year 1911, such an acquiescence in, or implied acceptance of, the continuing and increased obstruction of the proposed back road as to evidence an abandonment on the part of the owners of lots 2 and 3—Nos. 320 and 322 Essex Road—of their right of way over the site of that proposed road at the back of lot 1?

Great reliance was placed for the plaintiff on the case of *Ward* v. *Ward* (1), but I do not think that the circumstances here are such as to render the decision there applicable. In that case the way in question was, throughout the period in question, open and available for the use of the owner of the dominant tenement, and had not, in fact, been used merely because during that period he had another and more convenient way to and from his tenement. That case would

(1) 7 Ex. 838.

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have applied here if the proposed back road had been formed, and made available for the owner of lots 2 and 3, and had merely not been used by him while he found his existing access by Essex Road sufficient. But, in fact, there has been not merely non-user, but the continuance and increase of obstructions which, in breach of the rights of the owners of Nos. 320 and 322, impeded, or, rather, prevented, the exercise of those rights. Had the back road once been formed as proposed, and had the owner of lot 1 shortly afterwards placed walls across the road in the old positions, then, as I understood the argument for the plaintiff, it was conceded that in default of an assertion of his rights he would have been presumed to have abandoned them, and would have lost them long before the year 1911. It seems to me that no sufficient distinction can be drawn in his favour, because what happened was not the making, but the continuance of the unlawful obstruction caused by the walls; and the case against him is much strengthened by what took place in the year 1883.

In Goddard on Easements, 8th ed., p. 521, it is, as I think rightly, stated that: "Non-user is generally the principal evidence of abandonment of an easement, but non-user is not by itself conclusive evidence that the right is abandoned, for it may be explained by, and must be considered with, the surrounding circumstances." In *Moore* v. *Rawson* (1), where a shop with ancient lights had been pulled down by the plaintiff seventeen years before action, and a stable with a blank wall had been erected in its stead, Abbott C.J. said that in such a case the onus lay on the plaintiff to show that at the time when he made the change, and apparently abandoned the windows, that was not a perpetual but a temporary abandonment of the enjoyment; and in *Reg.* v. *Chorley* (2) Lord Denman C.J. said: "The cesser of use coupled with any act clearly indicative of an intention to abandon the right would have the same effect (i.e., destruction of the right) without any reference to time. . . . . It is not so

(1) 3 B. & C. 332, 336. (2) 12 Q. B. 515, 519.

much the duration of the cesser as the nature of the act done by the grantee of the easement, *or of the adverse act acquiesced in by him*, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury." In this last passage the phrase "acquiesced in" clearly has no active meaning, but is satisfied by such quiescence without active protest or assertion of right, as was exhibited by the common owner of Nos. 320 and 322, James Edwin Corben. Here we have, during at least some thirty-eight years, not merely non-user of the way, but acquiescence in the above sense in an indefensible and increased obstruction of the right. And in my judgment the learned judge was entirely right in holding, not only that there was evidence that the right had been abandoned by the owners of lots 2 and 3, but that this evidence was sufficient and conclusive.

I should add that I attach no importance to the fact that in the assignment to the plaintiff in the year 1904 of the lease of lot 1, and in a three years' lease in the year 1908 of lot 3, and in the conveyance to the plaintiff in the year 1911 of lots 2 and 3, the proposed rights of way were mentioned, and the respective assurances were made subject to, and with the advantage of, these rights, as the case might be. In each case the transaction was solely between persons interested in the particular tenement in question, and was, as regards those interested in any other tenement, without their knowledge, or assent, and, indeed, a res inter alios acta; and, further, according to the ordinary practice of conveyancing, the conveying party in each case would, of course, avoid any risk they might incur under any implied covenants for title by assuming that the easement in question had been abandoned and affecting to convey without any mention of it. Such a proceeding would have been to incur the risk of having the questions at issue in this action determined in an action based on a breach of the implied covenants for title; and, further, even if a mention of the right of way in any such conveyance might operate to keep an existing right alive, it could not, in my view, revive an abandoned

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right; and in my judgment, in the circumstances of this case, abandonment had taken place by the end of last century at latest.

In my judgment this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Stanley Evans & Co.*
Solicitors for respondent: *Davey & Pearce.*

W. I. C.

Applied. MOODIE *v.* W. & J. SHEPHERD (BOOKBINDERS), LTD. [1949] 2 All E.R. 1044.

ASTBURY J. 1923 Dec. 7.

In re HACKNEY PAVILION, LIMITED.

[1923. H. 4360.]

Company—Register—Rectification—Deceased Member—Executrix—Right to Registration as Member—Directors' Right to decline—Board Meeting—Proposal to register—Board equally divided—No Casting Vote—Proposal not carried—Secretary instructed to return Documents—Whether a Declining by Board—Table A, art. 22.

Under an article equivalent to Table A, art. 22, the executrix of a deceased member of a company had the right to be registered as a member, subject to the directors' absolute discretionary right to decline such registration.

At a Board meeting of the two directors to consider the executrix's application for registration, one director proposed and the other opposed registration.

The Board being equally divided, and there being no casting vote, the proposal was not carried, and the secretary was instructed to write to the executrix's solicitors accordingly and to return all the documents —namely, a transfer by the executrix to herself, certificates and registration fee:—

Held, that the Board's right of declining registration required to be actively exercised by a vote of the Board ad hoc, and the mere failure to pass the proposed resolution for registration was not a formal active exercise of the right to decline. The executrix's absolute right to registration therefore remained intact, and the register must be rectified accordingly.

ORIGINATING MOTION.

The above company was registered on December 9, 1913, as a private company, with a capital of 10,000*l.* divided into 10,000 1*l.* shares, of which 9999 shares were allotted

for cash to the three directors Sunshine, Kramer and Rose equally, the odd share being unallotted. These directors were appointed life directors, and each of them held 3333 shares.

By art. 24 the directors may at any time, in their absolute and uncontrolled discretion and without assigning any reason, decline to register any proposed transfer of shares (with an exception immaterial hereto). The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year.

By art. 25: On the death of any member (not being one of several joint holders of a share) the executors or administrators of such deceased member shall be the only persons recognized by the company as having any title to such share.

By art. 26 (practically identical with Table A, art. 22): Any person becoming entitled to a share in consequence of the death or bankruptcy of any member shall, upon such evidence being produced as may from time to time be required by the directors, have the right either to be himself registered as a member in respect of the share, or, instead of being registered himself to make such transfer as the deceased or bankrupt person could have made; but the directors shall in either case have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy.

By art. 27: A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

By art. 86: The directors may . . . . determine the quorum necessary for the transaction of business. Until otherwise determined two directors shall constitute a quorum. Except

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where otherwise provided by these articles, questions arising at any meeting shall be decided by a majority of votes. The chairman shall not have a second or casting vote.

On February 3, 1922, Sunshine died, having by his will dated January 29, 1922, appointed his widow (the applicant) his executrix. The applicant proved the will on January 8, 1923, the probate was duly registered with the company, and the applicant thenceforth received dividends under art. 27.

On November 7, 1923, the applicant's solicitors wrote to the company enclosing a transfer of the 3333 shares from herself as executrix to herself in her individual capacity, fully executed and stamped, for registration by the company. They also enclosed the husband's certificates and registration fee.

On November 14, having received no reply, the solicitors wrote to the secretary asking for an acknowledgment of their former letter and a new share certificate in the applicant's own name.

On November 20 the application was brought before a Board meeting at which Kramer, Rose and the secretary were present, Kramer being in the chair. Rose proposed that the shares should be registered in the applicant's name as requested, but Kramer said: "I object in accordance with the articles of association." As there was no casting vote no resolution was passed, but Rose still wished the transfer registered.

The minute of the meeting was as follows: "A letter dated November 7, 1923, from [the applicant's solicitors] to the company enclosing transfer and 13 certificates and another letter dated November 14, 1923, were read. Mr. Rose proposed that the transfer be accepted and registered and that a new certificate be issued to [the applicant] for the shares mentioned therein. The proposal was not carried and the secretary was instructed to write to [the applicant's solicitors] accordingly and to return all the documents."

The directors took the chair at alternate meetings, and the above minute was confirmed by the Board on November 26 and signed by Rose as chairman.

On November 20 the secretary returned the transfer, certificates and registration fee to the applicant's solicitors, and informed them that his directors "under their powers contained in the articles of association declined to register" the proposed transfer.

On November 29 the applicant, who knew Rose's attitude in the matter, issued this originating notice of motion to rectify the register by inserting her name as the holder of the 3333 shares in substitution for her deceased husband's name.

Bischoff for the applicant. Unless the directors as a Board formally and actively exercised their fiduciary power of declining registration the applicant had an absolute right to be registered in her own name under art. 26. The transfer to herself as an individual was quite unnecessary: *In re T. H. Saunders & Co., Ld.* (1)

In the present case the Board, being equally divided, did not and could not actively exercise their right to decline registration. It is equally true that the proposal to register was not carried, and could not be carried. It is to remedy this latter deadlock and enforce the applicant's right that the present motion is brought: see *In re T. H. Saunders & Co., Ld.* (1)

Luxmoore K.C. and *G. G. Solomon* for the company. The applicant admittedly produced proper evidence of title under art. 26, but it is clear from the minute that the proposal to register was not carried, and that the secretary was instructed to write to the applicant's solicitors accordingly and to return all the documents. That is really a declining to register within art. 26. The right to decline is of course fiduciary, but there is no authority that it must be actively exercised by a formal resolution ad hoc.

ASTBURY J. [after stating the facts:] The sole question is whether the directors have declined registration under art. 26, as unless they have so declined the applicant is expressly

(1) [1908] 1 Ch. 415.

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given a right to registration by that article. Now the right to decline must be actively exercised by a vote of the Board ad hoc. At the actual Board meeting there was a proper quorum, but as the Board was equally divided, it did not and could not exercise its right to decline. Nothing was or could be done in the matter. The mere failure to pass the resolution for registration proposed by Rose and opposed by Kramer was not a formal active exercise of the right to decline within art. 26 and, in stating that under their powers the directors had declined to register, the secretary was in error, and had exceeded his instructions. The applicant's absolute right to registration therefore remains intact, and the register must be rectified accordingly. The company must pay the costs.

Solicitors: *Baddeleys & Co.; Arthur S. Joseph.*

G. R. A.

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PRATCHETT *v.* DREW.

[1923. P. 3147.]

Mortgage — Foreclosure Proceedings — Interim Receiver — Delivery up of Possession by Mortgagor—Form of Order.

Where, upon an application in a mortgagee's action for foreclosure or sale, an interim receiver is appointed of the rents and profits of the mortgaged premises and the mortgagor is in possession of the premises, the mortgagee is entitled prima facie to an order that the mortgagor do deliver up possession of the premises to the receiver, although the matter is within the discretion of the Court.

Hawkes v. *Holland* [1881] W. N. 128 and *Edgell* v. *Wilson* [1893] W. N. 145 followed.

Taylor v. *Soper* (1890) 62 L. T. 828 distinguished.

MOTION.

By deed dated August 1, 1922, the defendant William Alfred Drew mortgaged the freehold premises known as Kirkdale, Westbury Road, New Malden, Surrey, to trustees of the Loyal Flower of Hendon Lodge of the Independent Order of Oddfellows Manchester Unity Friendly Society to

secure the sum of 900*l.* with interest thereon. The principal sum was made payable by fifty equal quarterly instalments of 18*l.* each, the first to be paid on December 25, 1922; and it was provided that in case at any time any of the instalments or interest or any part thereof respectively should be in arrear and unpaid for the period of thirty days after the time appointed for the payment thereof the whole of the principal money which should for the time being remain unpaid should forthwith become payable and should be paid with interest by the mortgagor to the trustees on demand. It was also provided that the trustees should permit the mortgagor to retain possession so long as he should duly make the payments aforesaid, but that if he should make default in the payment of the instalments or interest for the space of three calendar months after the same shall have become due or should commit any breach of the covenants therein contained or should have a receiving order in bankruptcy made against him or be adjudicated a bankrupt then and in any of such cases the trustees might at any time thereafter enter into possession of the premises.

On June 28, 1923, a receiving order was made against the defendant Drew, and on July 3, 1923, he was adjudicated a bankrupt. The principal sum of 864*l.* with interest from March 25, 1923, was due and owing. The defendant Drew had neglected or refused to give up possession to the trustees on being requested to do so by a letter from the trustees' solicitors dated November 12, 1923.

In these circumstances the trustees took out a summons against the defendant Drew and his trustee in bankruptcy for sale or foreclosure of the mortgaged premises, and they now moved for an interlocutory order for the appointment of a receiver of the rents and profits of the same and an order that the defendant Drew be ordered within four days after service of the order to deliver up possession of the premises to the receiver.

H. Johnston for the plaintiffs. The plaintiffs are entitled as mortgagees to the appointment of a receiver, and the

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defendant Drew ought to be ordered to deliver up possession to the receiver. The authorities on the question have differed, but the practice of the Court is to order the mortgagor to deliver up possession to the mortgagee's receiver: *Griffith* v. *Griffith* (1); *Davis* v. *Duke of Marlborough* (2); *Reid* v. *Middleton* (3); *Baylies* v. *Baylies*. (4) In *Everett* v. *Belding* (5) and *Randfield* v. *Randfield* (6) it seems to have been thought that it was proper to give the mortgagor the option of attorning tenant to the receiver or delivering up possession. *Truman & Co.* v. *Redgrave* (7) is of very little assistance on the point, but in *Hawkes* v. *Holland* (8) the Court of Appeal definitely decided that the proper order was that the mortgagor should deliver up possession to the receiver. This is made clear from a note of the facts made by me from the papers at the Record Office. (9) In *Yorkshire*

(1) (1751) 2 Ves. Sen. 401.
(2) (1818) 2 Swanst. 108.
(3) (1823) T. & R. 455.
(4) (1844) 1 Coll. 537.
(5) (1852) 22 L. J. (Ch.) 75.
(6) (1859) 7 W. R. 651.
(7) (1881) 18 Ch. D. 547.
(8) [1881] W. N. 128.
(9) *Hawkes* v. *Holland* [1881 H. 2261]. On October 11, 1878, the defendant purchased from the plaintiff the equity of redemption in the hereditaments hereinafter mentioned subject to a first mortgage for 13,000*l.* and other incumbrances. On the same day the defendant executed in favour of the plaintiff a mortgage for 5000*l.* of the property, which was therein described as a messuage or farmhouse with the barn, stables and other buildings four cottages and several pieces or parcels of grass and arable land containing 387 a. 2 r. 17 p. situate in Spalding and Deeping St. Nicholas, subject to the prior incumbrances. The mortgage contained a covenant that if default be made in payment of principal or interest the plaintiff might enter and hold and enjoy without disturbance. Interest fell in arrear and the plaintiff required the defendant to give up possession, but he refused to do so.

On July 7, 1881, Hall V.-C. appointed a receiver. In an affidavit of the plaintiff read in the Court of Appeal filed July 28, 1881, it is stated: "It was submitted to the Registrar that the Order should contain the common directions that the defendant deliver up possession of the premises to the receiver." The registrar refused; and a motion to vary minutes was refused.

The defendant appealed against the appointment of a receiver; the plaintiff gave notice that he should apply to vary the form of Order and move for an injunction. On August 3, 1881, the following order was made in the Court of Appeal: On motion by way of appeal by defendant from order of July 7, 1881, and upon motion for injunction at the same time made by plaintiff and on application of plaintiff that the receiver should be at liberty to enter upon the hereditaments and premises mentioned in the order

Banking Co. v. *Mullan* (1) the alternative form of order seems to have been adopted, following *Randfield* v. *Randfield*. (2) The order in *Taylor* v. *Soper* (3) is directly contrary to *Hawkes* v. *Holland*. (4) It is true that in that case, as here, the mortgage was a legal mortgage, but since the Judicature Act, 1873, the rights of a legal and of an equitable mortgagee with regard to the appointment of a receiver are identical. In *Edgell* v. *Wilson* (5) there was an order to deliver up possession to a legal mortgagee. The alternative remedy was resorted to in *In re Burchnall* (6), but this was by consent; and in *Ind, Coope & Co.* v. *Mee* (7) there was an order for delivery of possession. There is a divergency of opinion as to the practice in the text-books: see Coote on Mortgages, 8th ed., p. 973; Seton's Judgments and Orders, 7th ed., pp. 739, 749, 768; Halsbury's Laws of England, vol. xxi., p. 264. It is submitted that the proper form of order is for delivery of possession to the receiver.

Alan Ellis (*Sheldon* with him) for the trustee in bankruptcy.

TOMLIN J. This is a motion by a legal mortgagee for the appointment of a receiver of the mortgaged property, the motion being made against the mortgagor, who has been adjudicated a bankrupt, and his trustee in bankruptcy. The mortgaged property consists of a residence in the possession of the mortgagor, and the form of order asked for is that a receiver be appointed and that the mortgagor be ordered to deliver up possession to him. The application is supported by the trustee in bankruptcy so far as he is able.

There seems to be a question of considerable doubt whether

of July 7, 1881, and on reading orders and affidavits Order [defendant's appeal dismissed, etc.] and Order defendant on or before August 15, 1881, to deliver to receiver when appointed pursuant to order of July 7, 1881, possession of the said hereditaments and premises. Restrain defendant from removing crops in the meantime whether standing or already cut and now being thereon.

(1) (1887) 35 Ch. D. 125.
(2) 7 W. R. 651.
(3) 62 L. T. 828.
(4) [1881] W. N. 128.
(5) [1893] W. N. 145.
(6) [1893] W. N. 171.
(7) [1895] W. N. 8.

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on an interlocutory application for the appointment of a receiver by a mortgagee it is proper where the mortgagor is in possession to order him to deliver up possession or whether an order of that kind can only be made on judgment in the action being obtained. I have had a large number of cases cited to me which are thought to bear on the question, and there seems certainly to be some diversity of opinion expressed in them. I have however come to the conclusion that on an interlocutory application for the appointment of a receiver in an action brought by a mortgagee, whether legal or equitable, an order for the delivery of possession by the mortgagor to the receiver is an order which the Court has jurisdiction at this stage to make and that prima facie it is a proper form of order. I have had the advantage of seeing a note of the facts in *Hawkes* v. *Holland* (1) made for my assistance by Mr. Johnston from the papers at the Record Office, and I am satisfied that this point was expressly raised and determined by the Court of Appeal in that case and that it did in fact hold that this was a proper form of order, at any rate in the sense that it is prima facie a proper form of order. That view is supported by the decisions in two cases which are shortly noted in the Weekly Notes. The first is *Edgell* v. *Wilson* (2), where there was a motion by the plaintiff, who appears to have been the first mortgagee, for the appointment of a receiver of the mortgaged property, and North J., on the authority of *Hawkes* v. *Holland* (1), which he said was exactly in point, and was a decision of the Court of Appeal, ordered the mortgagor to deliver up possession to the receiver. The only comment that can be made on that case is that according to the report it was there agreed that the motion should be treated as the trial of the action; but if, in fact, this had already been agreed to when the case was dealt with by North J., I fail to see how the point raised in *Hawkes* v. *Holland* (1) could have been put in issue. I have no doubt that North J. determined the case as on motion, and that after it had been determined the parties were content to treat the motion as the trial of the action. The second case is

(1) [1881] W. N. 128. (2) [1893] W. N. 145.

Ind, Coope & Co. v. *Mee* (1), and in some respects it is a different case, as the motion was brought by the owners of a business for the interlocutory appointment of a receiver and manager and an order to deliver up possession to the receiver when appointed. North J. appointed the receiver and made an order for the defendant, who was the manager of the business, to give possession to the receiver. He said there must have been special circumstances in *Tayler* v. *Soper* (2), where the view was expressed that an order for possession could not be given except on final judgment. It appears from the headnote that this last mentioned case was an action by brewers for the foreclosure of a mortgage of a public-house, and that a receiver and manager had been appointed on an interlocutory application. "The mortgagor continued in occupation of a part of the premises, and was alleged to have acted in a manner which interfered with the proper conduct of the business by the receiver. The plaintiff now moved for an order directing the mortgagor to give up possession to the receiver, and restraining him from remaining in occupation of any part of the premises." It was held that the mortgagee was not entitled to such an order before judgment, and North J. said in the course of his judgment: "What I am asked to do is to make an order before trial of the action that the plaintiff should be put into possession of the property of which he seeks to recover possession by means of the action. It is true that the motion is to give the possession to the receiver, but the effect is that the defendant, who is in possession, is to be turned out before trial from the property, possession of which is the object of the action. I cannot make such an order." It will be observed that the learned judge who refused that order was the same judge who subsequently determined *Ind, Coope & Co.* v. *Mee* (1), and he distinguished his previous decision on the ground that there must have been some special circumstance. Reading the report, I cannot help thinking that there was in *Tayler* v. *Soper* (2) some special claim to a right of possession, which was an issue to be tried in the action, and that in asking that

(1) [1895] W. N. 8. (2) 62 L. T. 828.

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possession should be given to the receiver, the plaintiff was attempting to get the possession which he was claiming in the action by virtue of some right other than that of being mortgagee. In any case the two other decisions bear out the view that the conclusion of the Court of Appeal in *Hawkes* v. *Holland* (1) was in the sense which I have indicated.

I do not however wish it to be understood that there is no discretion in the matter. The order for possession is prima facie a proper order, but there is always a discretion in the Court to make the order in some other form—as, for example, by giving the mortgagor an opportunity to attorn tenant, if that order be thought more appropriate.

In the present case the mortgagor has been adjudicated a bankrupt, and prima facie there is nothing to be gained from the point of view of the plaintiff in giving him an opportunity to attorn tenant to the receiver. On the other hand I think such an opportunity ought to be given to him. He may be able to make an offer with such guarantees for the payment of rent as may justify the receiver in accepting it. I will make an order for delivery up of possession to the receiver on or before Friday, January 18, next; but I wish it to be understood—and this information must be conveyed to the defendant—that it is the intention of the Court that, if in the meantime he is able to make an offer to attorn tenant at a suitable rent with proper guarantees for its payment, the receiver shall bring that offer before the Court in order that it may determine whether the offer should be accepted rather than that the mortgagor should be turned out of his house.

Solicitors: *Sweetland, Greenhill & Stinson; Tarry, Sherlock & King.*

(1) [1881] W. N. 128.

H. C. G.

JACOBS *v.* BATAVIA AND GENERAL PLANTATIONS TRUST, LIMITED.

P. O. LAWRENCE J.

1923

Dec. 3, 18.

[1923. J. 1972.]

Contract—Company—Contract contained in two Written Instruments—Prospectus—Promise in Prospectus—Deposit Notes—Collateral Contract.

The plaintiff, in reliance upon a prospectus issued in September, 1920, by the defendant company (hereinafter called "the Trust"), applied for and had allotted to him subject to the terms of the prospectus four 100*l.* 7½ per cent. profit sharing deposit notes of the Trust. It was stated in the prospectus that the notes would be paid off at 105 per cent. by four annual drawings, and, under the heading "Earlier payments," that the Trust retained the right to pay off at 105 per cent. all or any of the outstanding notes at any time on giving three months' previous notice in writing, but that in the event of the sale of the Trust's R. B. estates, further referred to in that prospectus (which according to the construction placed upon the prospectus by the Court was not confined to a sale under a certain option of purchase referred to later in the prospectus, but included a sale to anybody whomsoever), the Trust would set aside out of the proceeds of sale a sum sufficient to redeem all the notes then outstanding, and the holders would be given an option of being then paid off in cash at 105 per cent. or of retaining their notes till the date of drawing. Each of the notes, which was in the form of the specimen note referred to in the prospectus, provided that the Trust would, as and when the principal sum of 100*l.* became payable in accordance with the conditions indorsed thereon, pay to the plaintiff the sum of 105*l.*, and was expressed to be subject to and with the benefit of those conditions, which repeated the provisions contained in the prospectus for the redemption of the notes by drawings and the option retained by the Trust to pay off the notes on notice, but did not refer to the promise by the Trust contained in the prospectus as to earlier payment in the event of the sale of the Trust's R.B. estates.

The option to purchase referred to in the prospectus having lapsed and the Trust having contracted to sell the R.B. estates without having given notice to the plaintiff that his option to be paid off or to retain his notes had thereby become exercisable, and the Trust having repudiated their liability to perform their promise contained in the prospectus, the plaintiff brought this action to have such liability of the Trust established and for an injunction to restrain them from dealing with the proceeds of sale without in the first place setting aside a sum sufficient to pay off the outstanding notes:—

Held, that the plaintiff was entitled to the relief claimed on either of two grounds—namely, (1.) that the entire contract was contained in two written instruments—namely, the deposit notes and the prospectus, the terms of which the Court could reconcile by construing the promise in the prospectus as if it were inserted in the note as a proviso to come into operation, if and when the R. B. estates were sold, or (2.) that the

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promise was a binding collateral contract, the consideration for which was the contract by the plaintiff to take up the notes, and that, as the terms of that promise and an animus contrahendi on the part of the plaintiff and the Trust had been clearly proved, the test laid down by Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* [1913] A. C. 30, 35, 47 was satisfied.

Held, further, that, notwithstanding that the collateral promise did in fact add to and vary the terms of the contemporaneous deposit notes by conferring additional rights on the holders, in the event of a sale of the R. B. estates, and by modifying, in that event, both the covenant to pay the principal moneys (which according to the deposit notes were only to be paid when the note was drawn for payment) and also the condition if the holder should exercise his option of retaining his note until the same was drawn for payment, yet, as that collateral promise was in fact a written and not a verbal contract, it did not fall within the purview of the decisions in *Morgan* v. *Griffith* (1871) L. R. 6 Ex. 70 and *Erskine* v. *Adeane* (1873) L. R. 8 Ch. 756.

In re Tewkesbury Gas Co. [1911] 2 Ch. 279; [1912] 1 Ch. 1 and *British Equitable Assurance Co.* v. *Baily* [1906] A. C. 35 distinguished.

WITNESS ACTION.

The following statement of facts, so far as material, is taken from the judgment of P. O. Lawrence J. :—

In pursuance of a resolution passed on September 22, 1920, by the directors of the defendant company (hereinafter called "the Trust"), a prospectus as then approved was issued by the Trust to the public on September 24, 1920, offering 100,000*l.* deposit notes for subscription at par in denominations of 10*l.*, 50*l.* and 100*l.*

The prospectus (after an introductory statement that application for over 20,000*l.* had already been made by shareholders and that the issue was made on the authority of resolutions of the board of directors dated July 7, August 23 and September 22, 1920) stated that interest on the notes would be payable half-yearly, that one-half of the surplus profits, after payment of a dividend of 7½ per cent. on the issued share capital, would be divided amongst the holders of the outstanding notes, and that the notes would be paid off at 105 per cent. (and pro rata on the smaller denominations) by four annual drawings of 25,000*l.* each at June 30, in the years 1922, 1923, 1924 and 1925 respectively, with interest to the respective dates. The prospectus then contained the following paragraph: "Earlier payments. The Trust retains

the right to pay off at 105 per cent. all or any of the outstanding notes at any time on giving three months' previous notice in writing, but in the event of the sale of the Rio Bravo estates (further referred to in this prospectus) the directors will set aside out of the proceeds of such sale a sufficient sum to redeem all the notes then outstanding and will give the holders the option of being then paid off in cash at 105 per cent. or of retaining their notes till the date of drawing." Later on in the prospectus there was a list of the Trust's investments at December 31, 1919. Amongst those investments there appeared as item 3 " Rio Bravo estates of 320,000 acres in Guatemala," which were stated to have been conservatively valued by the directors in their annual report issued in July, 1920, at 150,000*l.* The prospectus also contained the following paragraph : " Rio Bravo estates. Since the report was issued an option has been granted to an American financial group to purchase these freehold properties from the Trust for 1,000,000 dollars (equal at present exchange rates to about 280,000*l.*) showing an excess of 130,000*l.* over the directors' valuation." The prospectus further contained a statement that a specimen of the deposit notes with the conditions attached could be seen at the offices of the Trust during business hours whilst the subscription list remained open.

In response to the invitation contained in the prospectus and in reliance upon the statements therein contained, the plaintiff on September 29, 1920, filled in and signed the application form annexed to the prospectus and sent it to the directors of the Trust. The plaintiff's application so far as material was as follows : " Having paid to your bankers the sum of 100*l.* being 25 per cent. on 400*l.* deposit notes now offered for subscription at par, I hereby request that you will allot the same to me and I hereby agree to accept the same or such less quantity (if any) as may be allotted to me subject to the terms of the prospectus and of your memorandum and articles of association and I undertake to pay the further amounts as they become due according to the terms of issue." On October 1, 1920, the plaintiff received a letter

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signed by the secretary of the Trust which, so far as material, was as follows: "We beg to inform you that in accordance with your application the directors have allotted to you 400*l.* profit-sharing deposit notes forming part of the issue of 100,000*l.* of such profit-sharing deposit notes offered for subscription at par." On December 22, 1920, the Trust sealed and sent to the plaintiff four deposit notes of 100*l.* each, which were in the same form as the specimen note referred to in the prospectus. Each of the deposit notes contained the following three clauses:—

"1. The Batavia and General Plantations Trust, Limited (hereinafter called 'the Company'), will, as and when the principal sum of 100*l.* above mentioned (hereinafter referred to as 'the principal moneys') becomes payable in accordance with the conditions endorsed hereon, pay to Sydney Jacobs of the Bungalow, Bray, Berks, or other the registered holder for the time being (hereinafter called 'the holder'), the sum of one hundred and five pounds.

"2. The Company will in the meantime pay to the holder interest on the principal moneys by equal half-yearly payments on June 30 and December 30 in every year, the first payment of a full half-year's interest to become due and payable on December 30 next.

"3. This deposit note is issued subject to and with the benefit of the conditions endorsed hereon, which are deemed to be part of it."

The conditions indorsed on the deposit notes were nineteen in number. The only conditions which are material to be here mentioned are the fifth and sixth conditions. By the fifth condition it was provided (inter alia) that one-fourth in value of the total outstanding notes of the issue with all arrears of interest would be paid off at 105 per cent., and pro rata, on June 30 in each of the years 1922, 1923, 1924 and 1925, the particular notes to be redeemed on each occasion being determined by drawings; and by the sixth condition it was provided that the company should be entitled at any time, upon giving three months' previous notice in writing to the holder, to pay off the principal moneys together with interest

(free of income tax) up to the date of payment and arrears of interest, notwithstanding that the note might not have been drawn for payment off. No reference was made either in the body of the deposit notes or in the conditions indorsed thereon to the Trust's promise of earlier payment in the event of the sale of the Rio Bravo estates.

The public did not take up the whole of the deposit notes offered for subscription, and on December 21, 1920, the Trust issued a circular to its shareholders inviting them to subscribe for the balance of such deposit notes. In that circular the nature of the deposit notes was described, and amongst other statements not material to be here set forth, was the following statement :—

"The notes are to be paid off at 105 per cent. by four annual drawings of 25,000*l.* each at 30 June in each of the years 1922, 1923, 1924 and 1925, or may be repaid at an earlier date, if the directors so decide ; and, in the event of the Rio Bravo estates being sold, note holders may elect to be paid off out of the proceeds of such sale." No mention was made in this circular of the option to purchase the Rio Bravo estates granted to the American financial group.

In December, 1921, the plaintiff purchased two further deposit notes for 100*l.* each from one Cross, and in April, 1922, the plaintiff purchased four further deposit notes for 100*l.* each from one Hooker.

The American financial group referred to in the prospectus did not exercise the option to purchase the Rio Bravo estates, and that option lapsed some time before the month of December, 1921, as appeared from the report of the directors of the Trust presented in that month to the shareholders.

The plaintiff not having been given the option of being paid off in accordance with the promise made by the Trust in the prospectus, and being apprehensive that the directors of the Trust did not intend to set aside out of the proceeds of sale of the Rio Bravo estates a sufficient sum to redeem the outstanding deposit notes, caused a letter to be written to the Trust on June 26, 1923, requiring payment of 650*l.* secured

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by six of the deposit notes held by him; and, not having received any satisfactory reply, commenced this action on July 4, 1923.

By the statement of claim the plaintiff claimed (1.) a declaration that the Trust was bound to set aside out of the proceeds of sale of the Rio Bravo estates a sum sufficient for the payment off at 105 per cent. of the outstanding deposit notes and to apply the same for that purpose, except in so far as the holders of the deposit notes might elect to retain their deposit notes until they were drawn for redemption, or alternatively, that the Trust was bound to set aside and apply thereout a sufficient sum to redeem the plaintiff's deposit notes at 105 per cent., and (2.) an injunction restraining the Trust from applying or using the proceeds of sale of the Rio Bravo estates or any part thereof without setting aside and applying a sufficient sum for the purpose aforesaid or alternatively, without setting aside and applying a sufficient part thereof for and to the payment off at 105 per cent. of the plaintiff's deposit notes.

The Trust resisted these claims on the grounds, first, that the deposit notes constituted the only subsisting contract between the plaintiff and the Trust, and that, upon the issue of the deposit notes, the prospectus ceased to have any effect for the purpose of constituting a contract, and secondly, that on the true construction of the paragraph in the prospectus entitled "Earlier Payment," the promise contained in such paragraph only became operative in the event of a sale of the Rio Bravo estates to the American financial group resulting from the option to purchase mentioned in the prospectus, and that, as such option was never exercised, the promise never became effective.

Upon the question of construction thus raised, it is enough to state, for the purpose of this report, that the Court held, after hearing the arguments, that the promise in the prospectus was not confined to the event of a sale of the Rio Bravo estates under the option given to the American financial group, but extended to the event of any other sale of those estates.

Jenkins K.C. and *Cecil Turner* for the plaintiff. The deposit notes do not contain all the terms of the contract. The prospectus contains a promise by the Trust, in the event of a sale, to set aside a sum sufficient to pay off the outstanding deposit notes. The terms of the contract are to be found in two written documents—namely, the deposit notes and the prospectus—which are capable of being read together, and do not conflict; or, in the alternative, the promise contained in the prospectus is a contract collateral to the contract contained in the deposit notes.

Schiller K.C. and *Heckscher* for the defendants. The action, which is not one grounded on misrepresentation in the prospectus, is misconceived. The prospectus forms no part of the contract; it was issued merely for the purpose of supplying information and inducing a contract. The deposit notes contain the whole contract between the parties. If the statements in the prospectus are to be incorporated in the deposit notes, it follows that there would be a guaranty by the Trust that the Rio Bravo estates were worth 150,000*l.* This action is an attempt, by ingeniously pleading the existence of a collateral contract consisting of the promise in the prospectus, to obtain a charge on those estates. It is not permissible to refer to statements in the prospectus for the purpose of interpreting the contract contained in the deposit notes: *In re Tewkesbury Gas Co.* (1) and *British Equitable Assurance Co.* v. *Baily.* (2) If there is a collateral contract, its terms are at variance with the express terms of the deposit notes. If it is decided that the statement in the prospectus operates as a binding collateral contract, then such a decision would have far-reaching results, since every statement in a prospectus would be given the effect of a warranty.

Jenkins K.C. in reply. There is no magic about a prospectus: it is a fallacy to say that a contract cannot be found in a prospectus; there is no reason against it. Prima facie, one would look at the deposit notes to find the contract, but that does not preclude the existence of a collateral contract, which may be found in a letter or an application

(1) [1911] 2 Ch. 279; [1912] 1 Ch. 1. (2) [1906] A. C. 35.

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for shares in combination with a prospectus. Here the promise in the prospectus is a collateral contract: it provides what terms are to be put in the deposit notes. It is not contended that the prospectus here is to be used for the purpose of interpreting the deposit notes. In *In re Tewkesbury Gas Co.* (1) the debentures contained all the terms of the contract; the question there was one relating to the interpretation of the debentures, and the company there was relying upon a statement in the prospectus. In *British Equitable Assurance Co.* v. *Baily* (2) the whole contract was contained in the policies. Both cases are distinguishable from the present on the facts; but in one respect the latter of those two cases is in favour of the plaintiff, in that the possibility of a collateral contract in the prospectus is clearly recognized in the speeches delivered by the learned Law Lords. (3) The collateral contract must not be inconsistent with its principal contract; but every collateral contract must naturally effect a modification of the principal contract. Here there is no inconsistency between the promise in the prospectus and the terms contained in the deposit notes; but there is an addition to the principal contract. At most, the Trust is tying its hands in a given event. The application of the plaintiff and the allotment to him each recognizes the prospectus; the offer which the Trust made was accepted, and the Trust is bound to carry it out. Even if the collateral contract were a verbal one, it would make no difference, because it is quite independent of and in no way conflicts with the deposit notes: Leake on Contracts, 7th ed., p. 130; *Morgan* v. *Griffith* (4) and *Erskine* v. *Adeane.* (5)

Schiller K.C. replied on the two new authorities cited. *Morgan* v. *Griffith* (4) and *Erskine* v. *Adeane* (5) draw the line of demarcation as to how far a collateral contract can be read as part of the principal contract. In those cases the lease was not contradicted, modified or affected in any manner by the terms of the collateral agreement. A collateral

(1) [1911] 2 Ch. 279; [1912] 1 Ch. 1.
(2) [1906] A. C. 35.
(3) [1906] A. C. 35, 38, 41.
(4) L. R. 6 Ex. 70.
(5) L. R. 8 Ch. 756.

contract may not contradict, vary or affect the subject matter of the principal contract. In both those cases the collateral agreement was absolutely independent of the lease, as independent as an agreement, collateral to a lease, to supply the lessor with meat would be. But the prospectus here does in fact vary the terms of the deposit notes. Anything that adds to the terms of the contract itself is, in effect, a variation. Here the fifth condition indorsed on the notes provided for the notes being paid off by drawings, while the option in the prospectus given to the holders, in a certain event, contradicts that condition. That option is plainly an addition to the contract contained in the deposit notes. Further, the option given to holders, in a certain event, to retain their notes is contradictory to the power of the Trust to pay off the outstanding notes.

Cur. adv. vult.

Dec. 18. P. O. LAWRENCE J. delivered a written judgment, in which, after stating the facts and deciding the question arising on the construction of the prospectus in favour of the plaintiff, he continued: I now come to the main ground of defence. Much reliance was placed by Mr. Jenkins upon the decisions in *Morgan* v. *Griffith* (1) and *Erskine* v. *Adeane* (2), but in my opinion these decisions do not, in the circumstances, help the plaintiff's case.

It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. Accordingly, it has been held that (except in cases of fraud or rectification and except, in certain circumstances, as a defence in actions for specific performance) parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties: see, e.g., *Lord Irnham* v. *Child* (3); *Martin* v. *Pycroft* (4); and *Jervis* v. *Berridge*. (5)

(1) L. R. 6 Ex. 70.
(2) L. R. 8 Ch. 756.
(3) (1781) 1 Bro. C. C. 92.
(4) (1852) 2 D. M. & G. 785.
(5) (1873) L. R. 8 Ch. 351, 360.

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In *Morgan* v. *Griffith* (1) and *Erskine* v. *Adeane* (2) it was held that evidence was, however, admissible to prove a verbal collateral agreement made in consideration of one of the parties executing a deed under seal, provided that such verbal agreement did not add to, vary or contradict the terms of the deed itself. These cases are sometimes said to form an exception to the rule referred to, but in truth they are outside the mischief aimed at and are not in conflict with the rule. The foundation on which the decisions in those cases rests is that the verbal agreement is strictly collateral to the written instrument in the sense that it is independent of and does not in any way add to, vary or contradict any of the terms contained in such instrument.

My reasons for stating that the decisions in those cases do not assist the plaintiff's case are, first, because they deal entirely with verbal collateral agreements, whereas the agreement sought to be enforced here is a written agreement constituted by the written offer of the plaintiff to take the four deposit notes on the terms of the prospectus and the written acceptance of such offer signed by the secretary of the Trust acting under the authority of the board of directors and, secondly, because the principle upon which they proceed is, that the verbal collateral agreement does not add to, vary or contradict the terms of the deed, whereas the agreement in the present case directly affects the terms upon which the principal moneys mentioned in the deposit notes are secured, and does in fact both add to and vary those terms by conferring additional rights on the deposit holders in the event of the sale of the Rio Bravo estates and by modifying, in that event, both the covenant to pay the principal moneys (which according to the deposit notes are only to be paid when the note is drawn for payment) and also condition 6, if the holder should exercise his option of retaining the deposit note until drawn for payment. Had the promise which the plaintiff seeks to enforce in this action been merely a verbal promise, I should have felt constrained to hold that the rule of law, to which I have referred, was applicable and that

(1) L. R. 6 Ex. 70. (2) L. R. 8 Ch. 856.

evidence of such promise was inadmissible. The strength of the plaintiff's case, in my judgment, lies in the fact that the promise is incorporated in the written contract signed by the parties.

The real point which, in my opinion, has to be determined here is, whether the deposit notes issued to the plaintiff do, in fact, express the whole bargain which was come to between him and the Trust, or, whether they only express part of such bargain, and the promise which the plaintiff seeks to enforce constitutes the rest of the bargain and still remains operative. If the latter be the correct view, the promise would, in my opinion, be enforceable on one or other of the following grounds, either because the entire contract between the parties is contained in two written instruments which this Court will construe together, that is, the deposit notes and so much of the preliminary written contract as has not been superseded by the deposit notes; or else, because the promise is a written collateral contract, the consideration for which was the entering into by the plaintiff of the contract to take the deposit notes. That such a written collateral contract is capable of strict proof without coming into conflict with any rule of law or procedure, although it operates to add to or vary another contemporaneous written contract, cannot, I think, be disputed; it is altogether outside the rule of law relating to the inadmissibility of parol evidence to add to, vary or contradict the terms of a written instrument. As regards such collateral contracts, the following remarks made by Lord Moulton in his address to the House (in which Lord Haldane L.C. concurred) in *Heilbut, Symons & Co.* v. *Buckleton* (1) are worth quoting: "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract . . . . [but] Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts, but the existence of an 'animus contrahendi'

(1) [1913] A. C. 30, 47.

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on the part of all the parties to them must be clearly shewn."

On the facts of this case I have come to the clear conclusion that the deposit notes issued to the plaintiff do not, and were not intended to, contain the whole of the terms of the bargain arrived at between the Trust and the plaintiff. The specimen deposit note which had been prepared, when the prospectus was issued and of which inspection by intending applicants was invited, did not embody the promise made by the Trust as set out in a prominent position on the front page of the prospectus, and I think it is perfectly plain, from a perusal of the prospectus, that the Trust intended that this promise should be an effective promise, notwithstanding that it was not to be inserted in the deposit notes.

The introductory sentence of the paragraph containing the promise obviously refers to the sixth condition indorsed on the specimen deposit note and, in my opinion, the true meaning of that paragraph is that, notwithstanding that by the sixth condition the Trust retains the right of redemption therein mentioned, the Trust promises that, in the event of the Rio Bravo estates being sold before the deposit notes are redeemed, the directors will, etc. The reason for not including the promise amongst the conditions indorsed upon the deposit notes is not obvious, and, as no witnesses have been called on behalf of the Trust, and, as no explanation has been offered by counsel for the Trust, the Court is not called upon to speculate as to the true reason for its exclusion. It has not been suggested that this exclusion was due to any bargain between the parties that the promise should not be effective nor that it was due to any waiver of the benefit of the promise on the part of the plaintiff, and, in my judgment, the inference that the Trust intended that it should remain a continuing binding promise is, in the circumstances, overwhelming. The promise was inserted in the prospectus to make the issue more attractive to the public, and such insertion would have been quite meaningless and highly misleading if, as now pleaded, the promise was to have no effect after the deposit notes had been issued.

In the result, I hold that the promise constitutes a binding operative contract which was not superseded by the issue of the deposit notes; and that the latter do not contain the whole contract between the parties, but that the entire contract is compounded of two documents, that is, the deposit note and the written collateral promise, which two documents the Court will construe together, or, alternatively, that the promise constitutes a binding collateral contract in writing which the plaintiff is entitled to enforce. Treating the two documents as together constituting the entire contract, there is no difficulty in construing the promise, just as if it had been inserted in the deposit notes as a proviso to come into operation, if and when the Rio Bravo estates were sold; and treating the promise as a collateral contract and applying Lord Moulton's test in *Heilbut, Symons & Co.* v. *Buckleton* (1), I am satisfied that it has been strictly proved, and that its terms and the existence of an "animus contrahendi" on the part of the Trust and the plaintiff have been clearly shown.

Heilbut, Symons & Co. v. *Buckleton* (1), moreover, affords a complete answer to Mr. Schiller's argument that a decision in this case that the promise operates as a binding collateral contract is tantamount to a decision that every statement of fact in a prospectus amounts to a warranty. The promise in the present case is not a promise merely to be inferred from a statement of fact, but is a promise made in so many words; and there is no need here to embark upon the vexed question, whether a statement of fact is or is not intended to amount to a contract or warranty. The form of the promise itself, in my judgment, conclusively shows that the Trust intended that all applicants, on accepting the invitation extended to them by the prospectus, would have certain rights and privileges additional to the rights intended to be conferred on them by the deposit notes.

Mr. Schiller has further contended that the decisions of Parker J. in *In re Tewkesbury Gas Co.* (2) and of the House

(1) [1913] A. C. 30, 47.
(2) [1911] 2 Ch. 279; [1912] 1 Ch. 1.

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of Lords in *British Equitable Assurance Co.* v. *Baily* (1) prevent the Court from holding that the promise in this case constitutes a binding contract. In my opinion, these decisions do not have any such effect.

In the *Tewkesbury Case* (2) the only question was as to the construction of a debenture which contained the whole contract between the holder and the company, and it was held that the Court could not, in determining that question, properly refer to the prospectus pursuant to which the debenture was issued. That case is distinguishable from the present case, on the ground that, here, the whole contract between the plaintiff and the Trust is not contained in the deposit notes and on the further ground that, here, the prospectus is referred to for the purpose of proving the whole contract between the parties and not for the purpose of construing the deposit notes. In *British Equitable Assurance Co.* v. *Baily* (1) the House of Lords (reversing the decision of the Court of Appeal) held that a statement made in the prospectus of an insurance company as to the practice of the company in the distribution of profits did not, in the circumstances, amount to a contract between the company and the policy holders that the company would not alter such practice. Lord Macnaghten (3) points out that the prospectus there did not purport to give an assurance of any sort that the allocation of profits would never be altered. Lord Lindley says that the whole contract between the parties, there, was to be found in the policies themselves, and that the prospectus could not be legitimately referred to in order to construe the policies, and that he could find no contract to the effect contended for, and adds that a collateral contract so wholly opposed to the contracts contained in the policies was not, in his opinion, established by the evidence in that case. It is significant that none of the learned Law Lords who took part in that decision seem to have entertained any doubt that a collateral contract adding to or varying the terms of the policies might have been come to, if

(1) [1906] A. C. 35. (2) [1911] 2 Ch. 279; [1912] 1 Ch. 1.
(3) [1906] A. C. 35, 38, 41.

appropriate words had been found in the prospectus; the only conclusion arrived at, there, was that no such contract had been established by the evidence. So far from assisting the Trust's contention in this case, I am of opinion that *British Equitable Assurance Co.* v. *Baily* (1) is an authority tending in favour of the plaintiff.

In the result, for the reasons stated, I hold that the plaintiff is entitled to succeed in this action. Although my decision is based entirely upon the contract entered into by the Trust on the plaintiff's subscribing for the four deposit notes, I am of opinion that the plaintiff is not confined to the alternative relief claimed by him, but is entitled to enforce the whole of the promise according to its tenour, especially as there is a suggestion that the proceeds of sale received up to the present time may not be sufficient to pay off all the outstanding deposit notes, in which case the plaintiff would only be entitled at the present time to have the proceeds of sale set aside, and at most to payment of a share of such proceeds pro rata with all the other holders of outstanding deposit notes.

Accordingly I propose to make a declaration and grant an injunction in the general terms claimed in paras. 1 and 2 of the prayer of the statement of claim, omitting the alternative claim at the end of each paragraph, and the Trust must pay the costs of this action.

Solicitors for the plaintiffs: *Reid Sharman & Co.*
Solicitors for the defendants: *Jenkins, Baker & Co.*

(1) [1906] A. C. 35.

H. C. H.

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Nov. 8, 9, 12; *Dec.* 10, 11, 21.

Contract—Interference with contractual Rights—Procuring Breach of Contract —Justification—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *ss.* 3, 5.

The plaintiff was a theatrical manager. The defendants were members of a committee called the Joint Protection Committee, which was composed of representatives of five associations—namely, the Association of Touring Managers, the Variety Artists' Federation, the Actors' Association, the Musicians' Union, and the National Association of Theatrical Employees. The minimum wage for chorus girls was fixed by the Actors' Association at 2*l.* 10*s.* per week. The plaintiff paid his chorus girls 1*l.* 10*s.* per week. The contracts were from week to week, provided for a week's rehearsal without pay, and for "no play, no pay." No tour was booked for any fixed period, or for any appreciable time ahead. One member of the plaintiff's company, a girl of eighteen, was living in immorality with another member of the company, who was a deformed dwarf. The plaintiff knew that they were living together when he engaged them at a joint salary of 3*l.* a week. The girl was induced to lead an immoral life because she did not earn enough money to live on. In the case of another member of the company, whose wages were 1*l.* 10*s.* a week, the evidence given showed that there were reasons for believing that she was resorting to immorality. There was no doubt that the members of the company were leading a hand to mouth existence. The defendants desired in the interests of the theatrical calling and its members to stop such under-payment and its evil consequences, and, as the only means of doing so, induced theatre proprietors not to allow the plaintiff the use of their theatres, either by breaking contracts already made or by refusing to enter into contracts:—

Held, that the defendants were justified in their action, as they owed a duty to their calling and its members to take all necessary steps to compel the plaintiff to pay his chorus girls a living wage, so that they should not be driven to supplement their earnings by misconduct for the purpose of gain.

Semble, the business of presenting histrionic performances to the public for profit is a trade or industry in which actors are employed within the meaning of the Trade Disputes Act, 1906. There was a dispute between the Actors' Association and the plaintiff on the question of the minimum wage, and the fact that employers, the Association of Touring Managers, were represented on the Joint Protection Committee, together with employees, neither altered the nature of the dispute nor the parties to it. The Act would afford no defence to an action for damages for inducing a breach of a contract which was not a contract of employment.

WITNESS ACTION.

The plaintiff was the manager of a touring theatrical company. From Christmas, 1922, until March, 1923, he ran

a touring pantomime, which ended at Maidenhead. His company was then reconstituted on a co-operative basis, under which profits were to be equally divided, the chorus girls receiving a minimum salary of 1*l.* a week. Under this régime the plaintiff ceased to be the employer of members of the company. It came to an end on June 23, 1923. The plaintiff then began to run the company, and still ran it, as an employer, but on a percentage basis, with minimum guarantees. In the case of chorus girls, their contracts provided for a weekly wage of 3 per cent. of the net takings, with a guaranteed minimum of 1*l.* 10*s.* weekly, for one week's rehearsal without pay, and for "no play, no pay." The contracts were for no fixed duration; they ran from week to week. No tour was booked for any fixed period or for any appreciable time ahead. The plaintiff admitted that under this new arrangement the chorus girls never got beyond their guarantee—that is to say, they never received more than their 30*s.* a week. His opinion was that a girl could live comfortably on 1*l.* a week if two or three of them lived together. Under this new arrangement the company played at Dorking, Burton, Kettering, Plymouth, Coventry, and Cannock. It was due to play at Dudley for the week beginning August 13, 1923, and at West Bromwich for the week beginning August 20, by virtue of two contracts made between the plaintiff and the defendant Kennedy, who owned theatres at those two towns. Before the contracts were signed the plaintiff was asked by Kennedy's agent how he stood with the association, and replied: "Quite all right. I have never been approached by any of the association ever since I have been on the road." This statement was false, and the plaintiff knew it to be so.

Five associations represented the respective interests of the different classes of persons engaged in the theatrical calling—namely, the Association of Touring Managers, the Variety Artists' Federation, the Actors' Association, the Musicians' Union, and the National Association of Theatrical Employees. The four last were registered trade unions, the first named was not. In March, 1923, a committee was

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formed by these five associations composed of representatives of each association, and was called the Joint Protection Committee, the J. P. C. The defendant Casson was a member of it, and was one of the representatives of the Association of Touring Managers; he was until recently chairman of the committee. The defendant Voyce was also a member, and was one of the representatives of the Variety Artists' Federation; he was secretary of the committee. The defendant Fry was also a member, and was one of the representatives of the Actors' Association.

At a meeting of the J. P. C. on March 29, 1923, a resolution was passed "to deal specifically with any bogus person engaged in the industry in such manner as may be deemed advisable at any subsequent meeting. The committee shall be the sole judge as to whether action shall be taken against any bogus person."

For some considerable time past the Actors' Association (which included all the leading actors and actresses among its members) had been struggling to secure a living wage for chorus girls. Experience had shown in the past that in a very large number of cases the absence of a living wage drove such girls to prostitution. The minimum wage stipulated for by the Actors' Association, and embodied in what was known as the Valentine contract, was in the case of chorus girls 2*l.* 10*s.* a week. Another feature obnoxious to the Actors' Association was the sharing system or commonwealth company, not because it was bad per se, but because experience had shown that in most cases most of the money went to the manager and the others were paid too little or not at all. It was a system obviously capable of abuse, and one in which failure would hit hardest those least able to afford it. The Actors' Association had for some time past occupied itself in dealing with the question of "the bogus manager"—that is, a manager who recurrently failed to meet his obligations to his company or who paid them so little that they could not afford to live decently. The Actors' Association, or the Joint Protection Committee, had from time to time received reports about the plaintiff.

In 1920 the secretary of the Actors' Association wrote to the plaintiff and pointed out that he was breaking their rules in paying his chorus girls only 1*l.* 15*s.* a week, out of which they had to provide for tights, shoes, and washing. In March, 1923, the plaintiff informed an organizer of the Actors' Association that he was paying his chorus girls 2*l.* 5*s.* a week when he was only paying 1*l.*

In July, 1923, a lady who was a member of the plaintiff's company came to see Mr. Lugg, the secretary of the Actors' Association, with reference to the case of a young unmarried girl, a member of the plaintiff's company and aged about eighteen, who was living in immorality with another member of the company, a tiny, deformed creature, a dwarf. He was an abnormal man. Mr. Lugg brought the complaints against the plaintiff before the Joint Protection Committee, which, on July 25, passed a resolution " that Jack Arnold's show be proscribed as from August 6, it being operated on sharing contracts for performers." The J. P. C. also sent to the various managers of theatres a printed form : " It having been proved to the satisfaction of the J. P. C. that J. B. Arnold of the King Wu Tut Tut Revue is an undesirable person every step will be taken by the said committee to prevent his appearance at any place of entertainment. Signed, Louis Casson (chairman), Albert Voyce (secretary)." The J. P. C. wrote to the plaintiff that they had notified all managerial associations that on and after August 6 he would not be allowed to present his company. Mr. Lugg, in accordance with his instructions, went to Plymouth on July 27, and saw the girl, who admitted to him that the only reason she was living with the dwarf was that she had not enough money to live on. On August 2 the J. P. C. wrote to the plaintiff : " Mr. Lugg's report on his interview with you and some of your company at Plymouth last week was considered by the J. P. C. yesterday, and the J. P. C. adheres to their resolution, the contents of which were conveyed to you by the J. P. C. last week."

When the plaintiff engaged this couple on a joint contract he was aware that they were then living together. On August 10, 1923, the defendant Fry had an interview with

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the plaintiff, and told him that the J. P. C. had received complaints that he was not paying the minimum wage agreed between the Actors' Association and the Association of Touring Managers. The plaintiff replied that he cared nothing for any of the associations. Fry told the plaintiff he must consider himself in dispute with the Actors' Association. The company went to Dudley to open on August 13. Fry was there, and informed Kennedy, the proprietor of the theatre, that the Actors' Association was in dispute with Arnold and that the J. P. C. had proscribed him. Fry induced Kennedy to sign an undertaking not to allow Arnold to appear. The result was that the company neither played at Dudley that week nor at West Bromwich in the following week.

No threats were made to Kennedy to induce him to break his contract, but Fry, acting on the instructions of the J. P. C. and the Actors' Association, induced him to do so in order to further the dispute which existed between the plaintiff and the Actors' Association, which was supported by the other bodies by reason of the J. P. C. having taken the matter up. The defendants Casson, Voyce, and Fry admitted that they intended to induce theatre proprietors to break their contracts with the plaintiff and to abstain from entering into contracts with him, with the avowed object of driving him off the road, unless and until he paid the minimum wage of 2*l.* 10*s.* a week.

The writ was issued on August 22, 1923. An interim injunction until the trial having been refused by the vacation judge, the campaign against the plaintiff was vigorously pursued.

The plaintiff asked for an injunction to restrain the defendants Casson, Voyce, and Fry, their servants and agents, from inducing, or procuring, or conspiring, or combining, or attempting to induce or procure any person to break any contract or abstain from entering into a contract with him. The plaintiff asked for damages for breach of contract against the defendant Kennedy.

Courthope Wilson K.C. and *J. V. Nesbitt* for the plaintiff. Prima facie interference with a man's contractual rights and

with his right to carry on his business as he wills is actionable : per Lord Macnaghten in *Quinn* v. *Leathem*. (1)

Hastings K.C., *G. B. Hurst K.C.* and *C. A. J. Bonner* for the defendants Casson, Voyce, and Fry. Interference with contractual relations may be justified. For example, a father who discovered that his child had entered into a contract to marry an immoral person would be justified in interfering to prevent the contract being carried out : per Stirling L.J. in *Glamorgan Coal Co.* v. *South Wales Miners' Federation*. (2) Here the plaintiff permits and encourages girls to lead a vicious life, and therefore the defendants, who represent the theatrical profession, are entitled to put a stop to such a condition of things. " The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell " : per Bowen L.J. in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) The Court should consider the position of the parties to the contract, and the object of the person procuring the breach : per Romer L.J. in *Glamorgan Coal Case*. (4) The acts of the defendants are also justified, because it was in their direct trade interest to do the acts in question : *Ware and De Freville, Ld.* v. *Motor Trade Association*. (5) With regard to inducing persons not to enter into contracts with the plaintiff, even if the effect or the intent is to injure another, it is lawful to do so in one's own trade interests : *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (6)

The Trade Disputes Act, 1906, is also a defence to this action. The dispute was one between the plaintiff and the J. P. C., representing the theatrical associations, as to the payment of the minimum wage. " Trade dispute " means any dispute between employers and workmen, and " workmen " means all persons employed in trade or industry : Trade Disputes Act, 1906, s. 5. The business of presenting histrionic performances to the public is a trade or industry in which actors are employed. The case is analogous to

(1) [1901] A. C. 495, 510.
(2) [1903] 2 K. B. 545, 577.
(3) (1889) 23 Q. B. D. 598, 618.
(4) [1903] 2 K. B. 545, 574.
(5) [1921] 3 K. B. 40.
(6) [1892] A. C. 25.

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that of *Walker* v. *Crystal Palace Football Club, Ld.* (1), where the defendants carried on the game of football as a trade and the plaintiff, a professional football player, was held to be employed in that trade. The meaning of "trade" is not limited to the business of buying and selling only: *Bank of India* v. *Wilson.* (2)

G. B. Hurst K.C. and *Alan Ellis* for the defendant Kennedy.

Courthope Wilson K.C. in reply. A violation of a legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference: *Quinn* v. *Leathem.* (3) It is no justification to say that the interference of the defendants was for the pecuniary interest of the chorus girls: *Glamorgan Coal Co.* v. *South Wales Miners' Federation.* (4)

The alleged justification here is that the J. P. C. had a duty cast on them to protect the interests of the members of their associations, but that is not a legal justification: per Lord Macnaghten in *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (5) In the same case, where it had been contended that there was a moral or social duty on the part of the officials to induce the breach of contract, and that, as they acted in the interests of the men and without any ill-will to the employers, their conduct was justifiable, Lord Lindley (6) said: "This contention was not based on authority, and its only merits are its novelty and ingenuity." Here the acts of the defendants were directed to inflict harm on the plaintiff by preventing him earning his livelihood in the only way in which he could do so, and this course of conduct was intended to be continued until the plaintiff agreed to the terms of the J. P. C. "Such acts, so persisted in, seem to me to be in the nature of molestation or coercion; and although they do not involve recourse to physical force, I am far from satisfied that they are not such as to be illegal": per

(1) [1910] 1 K. B. 87, 92.
(2) (1877) 3 Ex. D. 108, 113.
(3) [1901] A. C. 495, 510.
(4) [1903] 2 K. B. 545, 579.
(5) [1905] A. C. 239, 246.
(6) Ibid. 255.

Stirling L.J. in *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland.* (1) Here there was in fact no "trade dispute." There was a policy of the Actors' Association to insist on a minimum wage. The contemplation of a dispute does not cover the case of coercive interference in which the intervener may intend if he does not get his own way to take ways and means to bring a trade dispute into existence: per Lord Shaw in *Conway* v. *Wade.* (2) Here Mr. Lugg merely informed the plaintiff that he was in dispute with the Actors' Association. There was no dispute between the plaintiff and his employees. To hold that every dispute in which an official of a union chose to interfere was a trade dispute would unduly extend the immunity conferred by the Act, and unduly curtail the common law right of others: per Lord Parker in *Larkin* v. *Long.* (3) The Act gives no protection unless there is a "trade dispute," which is defined, in s. 5, as a dispute between employers and workmen, or between workmen and workmen. Here the J. P. C. consists of unions of employers and unions of servants. It is submitted such bodies are not "workmen," and the constituent members of the unions represented by the J. P. C. are not "workmen" as defined in the Act—namely, "persons employed in trade or industry."

Trade in its largest sense is the business of buying and selling, with a view to profit, goods which the trader has either manufactured or himself purchased: *Grainger & Son* v. *Gough.* (4)

In the Oxford Dictionary "industrial" is defined as "pertaining to, or of the nature of, industry or productive labour," and "industry" as "a particular form or branch of productive labour; a trade or manufacture." The definition of "rural industries" in the Agricultural and Technical Instruction (Ireland) Act, 1899, s. 30, and of "industrial employment or occupation" in the Fatal Accidents Inquiry (Scotland) Act, 1895, s. 7, show that the Legislature by "industry" means "production." The word "workmen" when used in

(1) [1903] 2 K. B. 600, 623.
(2) [1909] A. C. 506, 522.
(3) [1915] A. C. 814, 832.
(4) [1896] A. C. 325, 345.

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connection with trade or industry means persons engaged in manual labour, either in trade, that is, buying or selling, or in industry, that is, production. Acting is neither a trade nor an industry, nor are actors workmen. The Act is no defence to the claim for damages for inducing Kennedy to break his contract, because the immunity conferred by s. 3 only applies to contracts of employment.

Cur. adv. vult.

Dec. 21. RUSSELL J. stated the facts and continued: It is difficult to speak of this condition of things with restraint. A young girl, almost a child, forced by underpayment to continue in sexual association with this abnormal man is, to my mind, a terrible and revolting tragedy, but the question which I have to decide is whether the acts of the defendants make them liable to an action at the suit of the plaintiff, or whether in the circumstances of this case there exists a sufficient justification for the acts which in the absence of such justification would be actionable. Before discussing the law let me say something further about the facts of this particular case. A multitude of matters and incidents in connection with his companies, and the members thereof, were put to the plaintiff in cross-examination, but as to most of these no affirmative evidence was given. Mr. Hastings deliberately refrained from calling such evidence, being content to rest his case as to specific incidents on the incident of the girl and the dwarf, and on the evidence as to another young girl in the company, whose wage was only 1*l.* 10*s.* a week, which shows there are reasons for believing that she was resorting to immorality. The evidence further reveals cases of unpaid landladies' bills. There can be no doubt that the company and its members were leading a hand to mouth existence.

In my opinion, it is true to say that the evils which the Joint Protection Committee and the associations represented by it anticipate as the result of a company being run by a manager paying insufficient salaries are to be found in the plaintiff's company. Prima facie interference with a man's

contractual rights and with his right to carry on his business as he wills is actionable; but it is clear on the authorities that interference with contractual rights may be justified; a fortiori the inducing of others not to contract with a person may be justified. I need only cite two passages from the judgment of Romer L.J. in *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (1): "The law applicable to this case is, I think, well settled. I need only refer to two passages in which that law is shortly and comprehensively stated. In *Quinn* v. *Leathem* (2) Lord Macnaghten said: 'A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.' And in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) Bowen L.J. included in what is forbidden 'the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it.' But although, in my judgment, there is no doubt as to the law, yet I fully recognise that considerable difficulties may arise in applying it to the circumstances of any particular case"; and later on he says: "I respectfully agree with what Bowen L.J. said in the *Mogul Case* (4), when considering the difficulty that might arise whether there was sufficient justification or not: 'The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell.' I will only add that, in analyzing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach."

My task here is to decide whether, in the circumstances of this case, justification existed for the acts done. Let me

(1) [1903] 2 K. B. 545, 573.
(2) [1901] A. C. 495, 510.
(3) 23 Q. B. D. 598, 614.
(4) 23 Q. B. D. 618.

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summarize the salient facts of the present case. The plaintiff is carrying on a business which involves the employment for wage of persons engaged in the theatrical calling, a calling in which numberless persons of both sexes are engaged in different classes of work throughout the country. The unions, or associations, formed for the purpose of representing and advancing the interests of those persons in connection with their different classes of work, and the interests of the calling as a whole, have ascertained by experience, and no one could doubt the fact, that it is essential for the safeguarding of those interests that there should be no sweating by employers. They have found by experience that the payment of less than a living wage to chorus girls frequently drives them to supplement their insufficient earnings by indulging in misconduct for the purpose of gain, thus ruining themselves in morals and bringing discredit on the theatrical calling. With the object of protecting those girls and of safeguarding the interests of the theatrical calling and its various members they have fixed standards of minimum wages, the minimum wage for chorus girls being fixed by the Actors' Association at the sum of 2*l.* 10*s.* a week. They find that the plaintiff is paying to his chorus girls wages on which no girl could with decency feed, clothe, and lodge herself, wages far below the minimum fixed by the Actors' Association. They have had previous experience of the plaintiff, and they cause fresh inquiries to be made, with the result that they are satisfied that many, if not all, the results anticipated by them to flow from such underpayment are present in the plaintiff's company. They desire in the interest of the theatrical calling and the members thereof to stop such underpayment with its evil consequences. The only way they can do so is by inducing the proprietors of theatres not to allow persons like the plaintiff the use of their theatres, either by breaking contracts already made or by refusing to enter into contracts. They adopt this course as regards the plaintiff as the only means open to them of bringing to an end his practice of underpayment which, according to their experience, is fruitful of danger to the theatrical calling and its members. In these

circumstances, have the defendants justification for their acts? That they would have the sympathy and support of decent men and women I can have no doubt. But have they in law justification for those acts? As has been pointed out, no general rule can be laid down as a general guide in such cases, but I confess that if justification does not exist here I can hardly conceive the case in which it would be present. These defendants, as it seems to me, owed a duty to their calling and to its members, and, I am tempted to add, to the public, to take all necessary peaceful steps to terminate the payment of this insufficient wage, which in the plaintiff's company had apparently been in fact productive of those results which their past experience had led them to anticipate. "The good sense" of this tribunal leads me to decide that in the circumstances of the present case justification did exist.

The result on this part of the case is that the defendants, Casson, Voyce, and Fry, have established a good defence to the plaintiff's action. This decision renders it unnecessary to consider the defence raised by them under s. 3 of the Trade Disputes Act, 1906, but in case the opinion of a higher Court is sought, it may be convenient to indicate shortly my views thereon. The plaintiff urged various points against this defence. He said that the case of actors was not within the section at all, because by the definition section the words "trade dispute" mean a dispute in which workmen are concerned, that is, "persons employed in trade or industry," and that acting is neither a trade nor an industry. This appears to me a narrow view of the section. There is no definition of "trade or industry" in the Act, but it seems to me that the business of presenting histrionic performances to the public for profit may fairly be described as a trade or industry in which many persons, including actors, are employed. It was further said that there was no trade dispute in fact. I do not agree. There was a dispute between the Actors' Association and the plaintiff upon the question that the plaintiff was employing actors at wages below the minimum wage. Another point urged was that this could not be a trade dispute within the Act, because certain

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employers—namely, the Association of Touring Managers—were represented on the Joint Protection Committee. This fact does not, in my opinion, alter the nature of the dispute or the parties to it. It was essentially a dispute which concerned the general body of actors represented by the Actors' Association on the one hand and an employer of actors on the other. Finally, it was said that the Act could afford no defence to the action, so far as it related to the inducement of Kennedy to break his contracts, because those contracts were not contracts of employment. As at present advised, this appears to me a good point. The protection of the section only extends to the grounds of actionability there specified. If the act is actionable on other grounds it is still actionable on those grounds. The section appears to me to afford no defence to an action brought in respect of the procurement of breach of a contract not being a contract of employment.

The remainder of the case—namely, the action against the defendant Kennedy—may be disposed of shortly. In ordinary circumstances Kennedy would be responsible for such damages, if any, as the plaintiff suffered by reason of Kennedy's breaches of contract. But the contracts were brought about by reason of a representation made by the plaintiff which was false, and known by the plaintiff to be false. Before the contracts were signed the plaintiff was asked how he stood with the association, and he replied: "Quite all right. I have never been approached by any of the association ever since I have been on the road." The statement was false, and false to the plaintiff's knowledge. If this be so, it is admitted by his counsel that he cannot recover.

The result is that the action is dismissed with costs.

Solicitors: *Hatchett-Jones & Co., for Higgs & Sons, Brierley Hill, Staffordshire; Theodore Goddard & Co.; Murr & Co., for Sharpe, Darby & Millichip, West Bromwich.*

J. B. B. M.

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Oct. 18, 19, 23, 24.

In re SHREWSBURY ESTATE ACTS.

SHREWSBURY *v.* SHREWSBURY.

[1922. S. 5536.]

Annuity—Jointure—Statutory Power—"Clear of all deductions whatsoever for taxes or otherwise"—Exemption from Income Tax—Shrewsbury Estate Act, 1843 (6 & 7 *Vict. c.* 28 (*Private*)), *ss.* 7, 9, 10—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 102, 103, 187—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

The Shrewsbury Estate Act, 1843 (6 & 7 Vict. c. 28), s. 7, empowered any owner in possession of the settled estates by deed to appoint a jointure to his wife for life not exceeding the yearly sum of 3000*l.*, "clear of all deductions whatsoever for taxes or otherwise," but by ss. 9, 10 the estates were not at any time to be subject to the payment of more than 6000*l.* in respect of three or more jointures, and there were complicated provisions as to the way the excess should be borne between a second and subsequent jointures, the subsequent jointures up to 1000*l.* being in this respect placed before the second jointure. By a jointure deed of July 20, 1910, the late Earl of Shrewsbury exercised this power by appointing two jointures of 1500*l.* to Lady Shrewsbury, "clear of all deductions whatsoever for taxes or otherwise." On May 5, 1904, another jointure of 1000*l.* had been appointed to the wife of the Earl's son and heir-apparent under the Shrewsbury Estate Act, 1862 (25 & 26 Vict. c. 5), s. 33, which did not contain the words "clear of all deductions," etc. This became payable on the son's death on January 8, 1915, but it was not suggested that it was free from income tax. The total amount of jointures now payable was under 6000*l.* The Earl died on May 17, 1921. The question then arose whether Lady Shrewsbury's jointures were payable free of income tax. Astbury J. held that they were not:—

Held, on appeal, that on the authorities, having regard to the provisions of the Income Tax Acts, and on the construction of the Shrewsbury Estate Act, 1843, the appellant was entitled to have her jointures paid in full free from deduction of income tax.

Lord Lovat v. *Duchess of Leeds* (1862) 2 Dr. & Sm. 62 and *In re Bannerman's Estate* (1882) 21 Ch. D. 105 approved.

In re Loveless [1918] 2 Ch. 1 distinguished.

Decision of Astbury J. [1923] 1 Ch. 486 reversed.

APPEAL from the decision of Astbury J. (1)

By a jointure deed of July 20, 1910, made between the late Earl of Shrewsbury of the one part and the plaintiff, his wife, of the other part, the Earl in exercise of his powers

(1) [1923] 1 Ch. 486.

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under the Shrewsbury Estate Acts, 1843 and 1862, as beneficial owner appointed unto and to the use of his wife the plaintiff for life for her jointure, subject to any rentcharges already limited under the powers of those Acts: First, the annual sum or yearly rentcharge of 1500*l.*, "clear of all deductions whatsoever for taxes or otherwise," to be charged upon the settled estates mentioned in s. 7 of the Act of 1843 (with immaterial exceptions), and to be paid and payable from the Earl's decease by equal half-yearly payments on August 1 and February 1 in every year, the first half-yearly payment thereof to be made on such of the said days as should first happen after the Earl's decease; secondly, the further annual sum or yearly rentcharge of 1500*l.*, "clear of all deductions whatsoever for taxes or otherwise," to be charged as aforesaid, and to be paid and payable from and after the decease of the survivor of the Earl and his mother (a prior jointress) by equal half-yearly payments on August 1 and February 1 in every year, the first half-yearly payment thereof to be made on such of the said days as should first happen after the decease of the survivor of the Earl and his mother. The Earl's mother died on July 29, 1912. The Earl died on May 17, 1921, whereupon his grandson the infant defendant, son of the late Viscount Ingestre, who died on January 8, 1915, became tenant in tail male in possession of the estates.

On November 17, 1922, the plaintiff issued an originating summons to have it determined (inter alia) whether upon the true construction of the Shrewsbury Estate Acts and the jointure deed her jointures were payable free of income tax and super tax.

The defendants were the infant tenant in tail male and the trustees of the estates for the purposes of the Shrewsbury Estate Acts, and also trustees for the purposes of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 42. The Shrewsbury Estate Act, 1843, provides as follows:—

By s. 7 the owner in possession of the estates is empowered by deed to appoint unto and to the use of his wife for life for her jointure (subject to any rentcharge previously limited

under this power or under another power thereinafter contained for charging annuities for daughters and younger sons) any annual sum or yearly rentcharge not exceeding the yearly sum of 3000*l.* "clear of all deductions whatsoever for taxes or otherwise," to be charged upon the settled estates therein mentioned, and to be paid and payable by equal half-yearly payments on August 1 and February 1 in every year, the first half-yearly payment thereof to be made on such of the said days as shall first happen after the appointor's death.

By s. 9, when the estates would be subject to the payment of more than the yearly sum of 5000*l.* for or in respect of jointures to three or more jointresses they shall not be subject to the actual payment of any greater sum for the second jointure than such a yearly sum as together with the first jointure shall make up 5000*l.*, or if the jointures subsequent to the second jointure do not amount to 1000*l.* then as together with the other jointures shall make up 6000*l.*; and the excess of the second jointure above the yearly sum to which the same is hereby limited shall sink for the benefit of the owner in possession.

By s. 10 the estates shall not at the same time be subject to the actual payment of more than 6000*l.* in respect of jointures, so that if apart from this proviso they would be subject to the actual payment of more than 6000*l.* for jointures the annual sum by the charge whereof that excess shall have been occasioned, or the part thereof forming that excess, shall sink for the benefit of the owner in possession, and the said jointures (subject to the provision in s. 9 for sinking of the second jointure) respectively to have preference or priority of payment according to their order of date.

The Shrewsbury Estate Act, 1862 (25 & 26 Vict. c. 5 (Private)), provides as follows:—

By s. 3 any Earl of Shrewsbury may jointure the wife of his heir-apparent to any extent not exceeding 1000*l.* a year for her life, and the jointure shall be payable from and after the decease of that heir-apparent; but if he survive the appointor and himself become Earl of Shrewsbury, then the

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jointure so appointed shall be deemed part of the jointure which he as Earl might appoint to her, and the power of jointuring wives created by the 1843 Act is amended, so that it shall have effect for the purposes of this enactment; and jointures appointed in accordance with this enactment shall be deemed to be appointed under that amended power: Provided that this Act shall not extend the limit of 6000*l.* a year fixed by the 1843 Act for the total amount of the several jointures in force at any one and the same time. This power was exercised by a deed of appointment of May 5, 1904, whereby Lady Ingestre (now Lady Winifred Pennoyer), the wife of the late Viscount Ingestre, then heir-apparent, was given a jointure of 1000*l.* from her husband's death on January 8, 1915. It was not suggested that this jointure was free from income tax.

This 1000*l.* jointure and the plaintiff's two jointures of 1500*l.* each were the only jointures now payable. Astbury J. held both on general principles and also on the construction of the 1843 Act, that the plaintiff's jointures were not payable free of income tax and super tax.

The plaintiff appealed as to income tax only.

Maugham K.C., *Bremner* and *Dighton Pollock* for the appellant. The considerations applicable to the construction of wills are different from those applicable to the construction of Acts of Parliament. The decisions in will cases are to some extent conflicting, and none of them is binding on this Court. We propose to disregard them and to argue the present case entirely on the construction of the Act of 1843. The question turns on s. 7 of that Act. No point, it is submitted, can be made either under s. 9 or s. 10 of the Act.

The Income Tax Act, 1842, provides for the way in which income tax is to be paid in the case of annuities. Sect. 102 is the section under which it will be suggested that income tax can be deducted from this annuity.

Sect. 103 imposes a penalty for refusing to allow the deduction authorized by the Act.

It is said that the draftsman of the Act of 1843 can only

have been referring to land tax. There are many objections to this contention.

[POLLOCK M.R. referred to *Pole-Carew* v. *Craddock*. (1)]

The section under which land tax can be deducted from annuities is s. 5 of 38 Geo. 3, c. 5. The position is exactly the same as regards income tax and land tax for the purpose of considering whether they come within the phrase "clear of all deductions whatsoever for taxes or otherwise." In each case the annuitant is not the person who pays under s. 102 of the Act of 1842 or s. 5 of the Act of 38 Geo. 3. It is the person who is in possession of the land out of which the annuity is payable who is chargeable. The owner of the land pays the whole of the land tax and deducts the part attributable to the rentcharge, and the same is the case with regard to the income tax. The sections are so drawn as to make the person who has to pay the annuity the statutory agent for the owner of the rentcharge: see *Pole-Carew* v. *Craddock*. (1) That case was followed by McCardie J. in *Harper* v. *Hedges*. (2)

Sect. 187 of the Act of 1842 is introduced for the protection of the Crown only. It refers to annuities or pensions granted by statute in respect of public services. Here the annuity was not granted by the private Act of Parliament. The Act only gives power to appoint one.

The question is whether income tax is not a tax within the words "clear of all deductions whatsoever for taxes or otherwise" within the Act of 1843.

There would be a difficulty in contending that super tax could be deducted.

On the construction of s. 7 of the Act of 1843 it is submitted that the contention of the appellant is right and that the decision of Astbury J. was wrong.

[POLLOCK M.R. referred to *Festing* v. *Taylor*. (3)]

Clauson K.C. and *Ashworth James* for the respondents. The authorities on wills are material in this case. The fallacy of the argument for the appellant is that it omits to take

(1) [1920] 3 K. B. 109. (2) [1923] 2 K. B. 314, 332.
(3) (1862) 3 B. & S. 217.

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notice of the Income Tax Act, 1842. The position is clearly explained in *In re Loveless* (1), where there is a luminous statement of the law by Swinfen Eady L.J.

[POLLOCK M.R. In the Income Tax Act, 1853, s. 40 still speaks of this operation as a deduction and not as a payment.]

It is submitted that when the defendants paid the appellant 2250*l.* in respect of her annuity and accounted for the balance of 750*l.* to the Inland Revenue they in fact paid her the annuity of 3000*l.*

The words of s. 60, Sch. A, No. IV., r. 10, of the Act of 1842 correspond with the words in s. 102: "the person to whom such payment liable to deduction is to be made shall allow such deduction, at the full rate of duty hereby directed to be charged, upon the receipt of the residue of such money, and under the penalty hereinafter contained; and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable."

The machinery adopted in this case is analogous to that followed in *Ashton Gas Co.* v. *Attorney-General.* (2)

Sects. 9 and 10 of the Act of 1843 assume that if there are two jointresses each will receive her jointure in full up to a total amount of 6000*l.*, but that if there are three the first will receive 3000*l.*, the second 2000*l.*, and the third 1000*l.*

The point is whether upon the construction of the Act of 1843 and the jointure deed the appellant is entitled to have her annuity of 3000*l.* clear or subject to the deduction of income tax. The payment of income tax is a payment and not a deduction within the meaning of the words in s. 7 of the Act of 1843. Sect. 102 of the Income Tax Act, 1842, provides in effect that where the owner of an estate charged with an annuity pays the whole of the taxes upon the estate and then pays to the annuitant the amount of the annuity less the proportion of the tax, as between the owner of the

(1) [1918] 2 Ch. 1. (2) [1906] A. C. 10.

estate and the annuitant the owner has paid the full amount of the annuity. He is to be acquitted as if he had paid the annuity in full.

In order to construe the words it is necessary to consider certain authorities in which similar words in wills have been interpreted. The first case is *Wall* v. *Wall.* (1) There the words were " clear of all taxes and deductions," and it was held that the annuity was subject to property tax. That was followed by *Lethbridge* v. *Thurlow* (2); *Sadler* v. *Rickards* (3); and *Turner* v. *Mullineux.* (4) In all those cases it was held that freedom from income tax could not be allowed.

In *Festing* v. *Taylor* (5) the words were very wide, and it was decided that s. 103 of the Income Tax Act did not prohibit a testator from directing that a rentcharge created by will should be free from income tax. It is not an authority on the meaning of the word " deductions." It does not therefore directly bear upon the point now before the Court. *Lord Lovat* v. *Duchess of Leeds* (6) was a case the other way, but it was decided upon the particular words " all taxes Parliamentary parochial or otherwise affecting the hereditaments." That was followed by *Abadam* v. *Abadam* (7); *In re Bannerman's Estate* (8); *Peareth* v. *Marriott* (9); and *Gleadow* v. *Leetham* (10), where Kay J., perhaps rather against his own view, held that the annuitant was bound to pay income tax. *In re Saillard* (11) follows the line of authority. There the words were " Free of all duties," with no reference to taxes, and it was held that the annuity must be paid subject to income tax.

[WARRINGTON L.J. referred to *In re Buckle.* (12)]

The law is clearly stated by Swinfen Eady L.J. in *In re Loveless.* (13)

(1) (1847) 15 Sim. 513.
(2) (1851) 15 Beav. 334.
(3) (1858) 4 K. & J. 302.
(4) (1861) 1 J. & H. 334.
(5) 3 B. & S. 217.
(6) 2 Dr. & Sm. 62.
(7) (1864) 33 Beav. 475.
(8) 21 Ch. D. 105.
(9) (1882) 22 Ch. D. 182.
(10) (1882) 22 Ch. D. 269.
(11) [1917] 2 Ch. 401.
(12) [1894] 1 Ch. 286.
(13) [1918] 2 Ch. 1.

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The tax is not to be paid out of the estate unless you can find that the annuitant is to receive something beyond the annuity—namely, the amount of the tax upon it. Income tax is not a charge on or a deduction from the annuity itself, but a personal liability of the annuitant.

Sects. 9 and 10 of the Act of 1843 make it clear that in no event for or in respect of jointures shall the estate be burdened to a greater extent than 6000*l.* If the first jointure is not free from income tax the sections work out perfectly, otherwise they are unworkable. The second jointress may get nothing, and the third 1000*l.* a year. This is an absurd result.

Another point arises under s. 187 of the Act of 1842, which provides that no statute granting any salary, annuity or pension to any person free of any taxes, deductions or assessments shall be construed or taken to exempt any person from the burden and charges of any of the duties granted by the Act. The Court will not construe a private Act as overruling a public statute: *Duke of Argyle* v. *Inland Revenue Commissioners* (1); *Pole-Carew* v. *Craddock.* (2)

[POLLOCK M.R. referred to *Stewart* v. *Thames Conservators.* (3)

WARRINGTON L.J. referred to *In re School for Indigent Blind at Liverpool.* (4)]

This Act of 1843 cannot be so construed as to exempt the appellant's jointure from income tax.

Maugham K.C. in reply. The words of s. 7 are very wide. It is impossible to say that income tax is not for some purposes a deduction. It is true that it is not so for all purposes. "Free from all deductions except income tax" is a common phrase. The problem in this case does not depend upon decisions upon wills given years after the passing of the Act. The words of the Act are reasonably clear, and it is unnecessary to discuss the cases.

POLLOCK M.R. This is an appeal from the judgment of Astbury J. given on March 22 of this year, upon an originating

(1) (1913) 109 L. T. 893.
(2) [1920] 3 K. B. 109, 124.
(3) [1908] 1 K. B. 893.
(4) [1898] 2 Ch. 669.

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summons taken out in order to have determined what was the effect of certain words in s. 7 of the Shrewsbury Estate Act, 1843. The point is a short one, but difficulty arises from the fact that a number of cases have been cited in which analogous points have arisen, and which we have had to consider.

The facts are fully stated in the report of the case before Astbury J. (1) Sect. 7 of the Act in question gave to the tenant for life of the Shrewsbury estates a power of jointuring his wife to the extent of 3000*l.* per annum. By a deed of July 20, 1910, made between the Earl of Shrewsbury of the one part and Lady Shrewsbury, the plaintiff, of the other part, the Earl in exercise of his powers under s. 7 appointed to his wife for her life a jointure of 3000*l.* a year and, following the words of the Act, granted it "to be paid clear of all deductions whatsoever for taxes or otherwise." The question arising upon the appeal is whether or not among the deductions from which the annuity is expressed to be clear income tax is included. The short point, therefore, is, does s. 7 of the Shrewsbury Estate Act, when it says that the annuity is to be paid clear of all deductions whatsoever for taxes or otherwise, mean that it is to be paid without any deduction for income tax, or does it mean that the balance only of the annuity is to be paid after income tax on 3000*l.* has been paid?

The words are obviously wide, and a layman would say at first sight that they were intended to relieve the annuitant from income tax. But it is contended that the words have been interpreted in the decided cases to have a meaning different from that which they appear to have at first sight. Counsel for the respondent argues that the difference between the amount of the annuity directed by the settlement to be paid and the sum annually received by the annuitant is not a deduction, but a payment, and not the less a payment because the money is paid to the revenue and not direct to the annuitant. He says it is money paid on behalf of the annuitant, money for which she is ultimately liable, and so money paid on her behalf in respect of the annuity

(1) [1923] 1 Ch. 486.

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which she is to receive. In support of that argument counsel relies upon particular sections of the Income Tax Acts and upon several decisions in the Courts in what have been comprehensively described as the will cases, and more particularly upon *In re Loveless.* (1) He says that the scheme of the Income Tax Acts is that the grantee of the annuity should bear the tax, that the person who pays it should collect it and pay it over to the revenue; but that as between the payer and the grantee of the annuity, the money collected for the revenue is to be deemed to be and is, for the purposes of the present case, a payment and not a deduction. It is said that a payment of this nature to the Inland Revenue under the income tax is not and cannot be a deduction, for its true nature is that it is a payment.

Now let me examine the relevant Income Tax Acts and the authorities, and I pass at once to s. 102 of the Income Tax Act, 1842. It is to be observed that that Act was passed before and was in existence when the Shrewsbury Estate Act of 1843 was passed. Sect. 102 says this: "That upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain," and so on, "there shall be charged for every twenty shillings of the annual amount thereof" the tax, whatever it may be, for the year net without deductions, "according to and under and subject to the provisions by which the duty in the Third Case of Schedule D may be charged." That is the charging section, and it creates a charge upon the sum generally. "Provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment." That is a very important provision, because, unlike other cases, there is to be no assessment upon the annuitant, but the duty is to be charged upon all the

(1) [1918] 2 Ch. 1.

profits and gains from which and out of which the annuitant receives the annuity. Then it goes on to provide that the person who is liable to pay shall be authorized to deduct out of such annual payment at the annual rate, whatever it may be, for every 20*s.* of the amount thereof, and the person to whom such payment liable to deduction is to be made, shall allow such deduction at the full rate of duty thereby directed to be charged, upon the receipt of the residue of such money, and under the penalty thereinafter contained, "and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto." It is clearly contemplated, therefore, under the section, that the whole of the moneys from which the annuity is payable are charged with the duty; the payment in respect of the duty is to be paid by the person who has to pay the annuity. There is to be no assessment on the annuitant at all, but the annuitant is to allow the deduction which is authorized to be made from the annuity, and upon receipt of the residue, that is the residue of the annuity after the deduction, the person who pays is acquitted and discharged of so much of his liability to pay the annuity. That is the scheme, and the section goes on: "as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable." It appears, although the statute may provide and does provide for the allowance of the deduction which is authorized, it does not turn what is a deduction into an actual payment, although as between the payer of the annuity and the annuitant the deduction is to be treated "as if the amount had actually been paid," which in fact it had not been. That is s. 102.

Then s. 40 of the Act of 1853 provides: "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half yearly or at any shorter or more distant periods, shall be entitled and is hereby authorised on

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making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable for every twenty shillings of such payment; and the person liable to such payment shall be acquitted and discharged of so much money as such deductions shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable." The same words are then used as to deduction, and as to the effect of the deduction; although it be a deduction, it is to be treated as if the amount thereof had been actually paid, which in fact it was not. The value of s. 40 was this, that it gave every person who was liable to make a payment of an annuity the right to deduct without any difficulty or without requiring a certificate which had been necessary in certain cases under s. 102. It is also to be observed, although it is not material for this purpose, I think, that the charging section is really unaffected by the Act of 1853; the difference is only one of machinery.

In this connection I desire to call attention to what Lord Macnaghten said in *London County Council* v. *Attorney-General* (1): "The charging section is s. 102. It extends to all annual payments. The charge is to be according to and under and subject to the provisions by which the duty in the third case of Sch. D. may be charged. Then there is a provision that 'in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act'—your Lordships will note those words; they extend to income chargeable under each of the five schedules—no assessment is to be made upon the person entitled to the annual payment. The whole of the profits and gains are to be charged, and the person charged in respect thereof is entitled to deduct a proportional part of the duty when he comes to make the annual payment to which he is liable. In every other case the annual payment is charged with duty in the hands of the recipient." Lord Macnaghten clearly points out what s. 102 had provided, that in this particular matter, the

(1) [1901] A. C. 26, 38.

payment of an annuity, the tax is charged upon all the profits and gains which are the source from which the annuity has to be paid. It is unlike all other cases. There is no assessment upon the annuitant.

Now it seems to me that the effect of s. 102 of the Act of 1842 is to provide for deductions to be made. No doubt the person paying the income tax and making the deduction is acquitted and discharged as if payment had been made to the annuitant, but the duty that falls upon the person responsible to pay the annuity is, first of all, to make a deduction. Stopping, therefore, at the Income Tax Acts it appears to me that a deduction has been made out of such annual payment in respect of the duty, for those are the words of the section—in respect of the duty which has to be paid. The words of s. 40 of the Act of 1853 are "deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable," and it is to be allowed by the annuitant who, "upon the receipt of the residue of such money," that is the residue of the annuity, is to accept that residue in full satisfaction as if the whole annuity had been paid to her. It is the residue that is paid; and a deduction from the total has been made before paying that residue. I think if one stops at the consideration of the Acts of Parliament and follows out the scheme and the provisions made thereunder, it would prima facie seem that there had been in this case, if the 3000*l.* is not paid in full to the annuitant, a deduction made for the tax or duty required to be paid under the Income Tax Acts.

Now another argument, while I am upon the statute, is presented by counsel for the respondent. He says, supposing the meaning of s. 7 of the Shrewsbury Estate Act is that contended for by the appellant, it is not a valid provision overriding the usual result; you cannot, in other words, allow an annuitant who ought to pay her own income tax to be released from that payment. This s. 7 is not affecting to do that. Counsel calls attention to s. 187 of the Income Tax Act of 1842. In my opinion s. 187 does not really assist his argument at all. It is quite true that

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in that section a provision is made that no statute "granting any salary, annuity or pension, shall be construed or taken to exempt any person, city, borough, or town corporate, from the burden and charges of any of the duties granted by this Act." That seems to point to statutes existing at the time when that section was passed. More than that, I have grave doubt whether the words "any salary, annuity or pension" apply to an annuity of the nature of that with which we are dealing in this case. The section, I think, refers rather to some salary, annuity or pension which is to be paid under some statute for a public purpose and in respect of the public service, and it does not appear to me to cover this particular case. However I do not think it can be regarded as intending to prevent Parliament by an Act passed later from dealing with the matter as it pleases, for the supremacy of Parliament cannot be fettered by the section, and inasmuch as this section was passed in the Act of 1842, and we are dealing with s. 7 of the Act of 1843, I do not think it is possible to say that s. 7 of the Act of 1843 is rendered invalid or ineffective by a section in a statute which was passed in the previous year. But then it is said that we must consider what is the meaning, by reference to other sections in the Shrewsbury Estate Act, and attention is called to ss. 9 and 10, in which a limit is put to burdening the estate under the Act, and counsel for the respondents suggests that curious, if not absurd, results would arise if the construction put upon s. 7 is such as to allow the full sum of 3000*l.* to be paid to the annuitant without any deduction of income tax. It is to be observed that ss. 9 and 10 follow s. 7 for the purpose of dealing with possible results in the family life of the Shrewsburys, but I cannot see how ss. 9 or 10 can impose a limitation upon the words contained in s. 7. Perhaps it is not irrelevant to observe that in the long recitals to this Act there had already been used in reference to a deed of December 31, 1829, the expression "an annual income clear of all deductions whatsoever," and when we come to s. 7 we find a much wider clause used than that which is to be found in the recitals. But whether that is of any importance

or not, in my judgment you cannot cut down the effect of s. 7 by looking to other sections which are to be used under different circumstances and for different purposes. Attention may be called to *Turner* v. *Mullineux* (1), where Sir William Page Wood V.-C. points out that once you have got a definite interpretation to be placed upon the words first used, the other words can be used as a short expression meaning the same thing; the reference is to the earlier and more complete sentence, but the effect is not to be changed by a subsequent and rather altered phrase. So here ss. 9 and 10 do not seem to me in any way to detract from the effect which ought to be given under s. 7 to the words which we have to construe.

Upon the statutes, therefore, I should be of opinion that there is a deduction which is made in respect of income tax, and that under the scheme of s. 102 it was none the less a deduction, although for certain purposes it was a payment, and that when you are considering the words of s. 7, which says that the annuity is to be paid clear of all deductions, those words are sufficient to prevent a deduction in respect of income tax.

But counsel for the respondent says that the authorities, which are comprehensively called the will cases, must be considered, and he cites first of all *Wall* v. *Wall* (2), a case before Shadwell V.-C., where the headnote is: "A testator gave to his wife an annuity or clear yearly rentcharge of 1800*l.* clear of all taxes and deductions. Held that the annuity was subject to property tax." The Vice-Chancellor's decision is given somewhat tersely. (3) Then we come to *Lethbridge* v. *Thurlow* (4) and *Sadler* v. *Rickards* (5), where the Vice-Chancellor followed the previous cases of *Wall* v. *Wall* (2) and *Lethbridge* v. *Thurlow*. (4) The next case is *Turner* v. *Mullineux* (1), where the words were: "free from income tax, or property tax, or any other deduction." Those cases follow one another. The words are somewhat different, but it is fair to say that in all those cases freedom from income

(1) 1 J. & H. 334.
(2) 15 Sim. 513.
(3) 15 Sim. 520.
(4) 15 Beav. 334.
(5) 4 K. & J. 302.

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tax was negatived. But in *Festing* v. *Taylor* (1), decided in the year 1862, and which went to the Exchequer Chamber, the words were: "Without any deduction or abatement whatsoever on account of any taxes, charges, impositions or assessments already or to be thereafter taxed, charged, assessed or imposed on the same hereditaments, or on the said rentcharge . . . . by authority of Parliament or otherwise howsoever." The words are very wide indeed, and it was admitted in the course of the case that the intention of the words was to prevent a deduction in respect of income tax. The real point decided was that s. 103 of the Income Tax Act, 1842 does not prohibit a testator from directing that a rent charge created by will shall be free from income tax. That was the real decision. But it is to be observed from an admission made in that case that the words were effective to include income tax, and the Court accepted that admission as having been properly and rightly made. It is quite true, therefore, that it is not an actual decision upon the point, but it is to be noted that it was Mr. Coleridge, the late Lord Chief Justice of England, who made the admission, and one cannot but think it may have been made because he felt it was not possible to argue that these very wide words would not include the income tax. In *Lord Lovat* v. *Duchess of Leeds* (2), which came before Kindersley V.-C. in 1862, there was a direction by will "to pay and defray all taxes—parliamentary, parochial or otherwise—affecting the hereditaments given to his wife. Held, that income tax came within the words 'taxes affecting the hereditaments'; that such direction did not contravene the terms of the Income Tax Acts; and, therefore, that the trustees were bound to pay an income or property tax payable in respect of the widow's interest in such hereditaments." So that we have the words there, "all taxes—parliamentary, parochial or otherwise—affecting the hereditaments," and it was held by Kindersley V.-C. that those words were operative to effect what was the intention

(1) 3 B. & S. 217. (2) 2 Dr. & Sm. 62.

of their author. It is quite true that he decided the case upon the particular words "taxes affecting the hereditaments," but it is only necessary to read his judgment to see that from that time onwards a different view was taken, and, indeed, apparently accepted by the Courts, as to whether or not the burden of income tax is excepted by these words "excepting deduction of income tax."

In *In re Bannerman's Estate* (1), Hall V.-C. followed the view presented by Kindersley V.-C., and held that the words "free from all deductions in respect of any present or future taxes, charges, assessments or impositions, or other matter, cause or thing whatsoever" enabled the widow to be paid the annuities in full, free from and without any deduction for income tax, definitely following *Lord Lovat* v. *Duchess of Leeds.* (2)

Then there are two more cases: *Peareth* v. *Marriott* (3) and *Gleadow* v. *Leetham.* (4) *Gleadow* v. *Leetham* (4) has been somewhat fully discussed, and it is right to observe that in that case the words were "the clear yearly sum of 600*l.*"; no more; no particular reference to taxes, but Kay J. (5), although he decided that the annuitant was bound to pay income tax, said: "I confess that but for the authorities referred to I should have felt a little more difficulty than I do, because the annuity being given by the testator to his wife, I do not see what the direction was aimed at if not the income tax." He therefore appears to find himself unfortunately bound by the authorities, but his own view would have been to give a wider interpretation to the words used in that particular case, which were certainly nothing like so wide as the words we have to construe. As Warrington L.J. has pointed out, it is important to observe that in *In re Loveless* (6) Swinfen Eady L.J. says that he thought *Peareth* v. *Marriott* (3), before Bacon V.-C., who allowed the deduction for income tax in that case, and *Gleadow* v. *Leetham* (4), before Kay J., were

(1) 21 Ch. D. 105.
(2) 2 Dr. & Sm. 62.
(3) 22 Ch. D. 182.
(4) 22 Ch. D. 269.
(5) 22 Ch. D. 274.
(6) [1918] 2 Ch. 1.

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sound decisions and that the rule there laid down must prevail. Those decisions really follow, if not in terms, upon the decision of Kindersley V.-C., although by reason of the narrow ambit of the words that had to be discussed in *Gleadow* v. *Leetham* (1) they were not wide enough to allow the deduction of income tax.

Then comes *In re Saillard* (2), where the words were "Free of all duties," with no reference to the word "taxes." It was held that the sum was to be paid subject to, and not free from, income tax.

The last of the will cases to which I need refer is *In re Loveless* (3), a decision of this Court. It is important to observe that although Swinfen Eady L.J. refers to s. 102 of the Income Tax Act of 1842 and s. 40 of the Act of 1853, there does not appear to have been any argument upon the meaning of those sections. They do not appear to have been discussed at length, and, therefore, what was said may go a little wider than was necessary for the purposes of the decision of that case. All that had to be decided was where, under a will, a payment was to be made out of the income to the testator's wife of a clear annuity, whether that word "clear" was sufficient to enable the annuitant to escape income tax, and it was held not to be so. But the suggestion has been made that some of the observations of the learned Lord Justices are contrary to and almost amount to a decision against the view presented on behalf of the appellant in this case. Bankes L.J., at the end of his judgment, makes the observation that the deduction of the income tax is made by the payer of the annuity "as statutory agent for the annuitant; and the amount which the annuitant receives, though less by the amount of the income tax, is none the less a payment, by the person liable to pay, of a clear annuity of the full amount." I think that was true in the case as between the annuitant and the person who pays the annuity, but I do not think the learned Lord Justice was applying his mind to what is the system in all cases under the Income

(1) 22 Ch. D. 269. (2) [1917] 2 Ch. 401.
(3) [1918] 2 Ch. 1.

Tax Acts, as to whether or not in no case can such a payment be a deduction; and more than that, I think I am right in saying that in that case *London County Council* v. *Attorney-General* (1) was not brought to his notice, and the observation made by Lord Macnaghten was not referred to in the whole of the case. In my view, therefore, it cannot be said that *In re Loveless* (2) is a decision which we are bound to follow, because I do not think it is a decision upon the point that we have to determine. Perhaps, therefore, I may summarize it thus; that whereas the earlier view presented in *Wall* v. *Wall* (3) and *Lethbridge* v. *Thurlow* (4) and *Sadler* v. *Rickards* (5) and the other cases which I have referred to up to the time when Kindersley V.-C. gave his judgment may go a long way to support the respondent's argument, when we come to the turn of the tide in *Lord Lovat* v. *Duchess of Leeds* (6) and the subsequent cases, I think it may be said that where you get a clause including the word "taxes" it may well be that the words are sufficient to include income tax, although, if there is no reference to the word "taxes," the decisions may stand in which it is held that a deduction for income tax cannot be made.

It is to be observed that before Astbury J. no reference was made to the more recent case before this Court of *Pole-Carew* v. *Craddock*. (7) There the question was whether or not the words contained in an Act under which a ferry was established and which contained a provision "that the then proprietors, or their respective heirs or assigns, 'shall not be rated or assessed for or toward the payment of any tax, rate, or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry,'" were apt to release the proprietors from the payment of income tax, and it was held "that the exemption granted by the statute extended to parliamentary taxes whether in existence at the date of the Act or not, and, therefore, included income

(1) [1901] A. C. 26.
(2) [1918] 2 Ch. 1.
(3) 15 Sim. 513.
(4) 15 Beav. 334.
(5) 4 K. & J. 302.
(6) 2 Dr. & Sm. 62.
(7) [1920] 3 K. B. 109.

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tax." The case perhaps is the logical conclusion of a number of authorities to which I have referred and some others, but it is important to observe that this Court definitely held that even in the case of a statute passed long before the Income Tax Act, immunity was granted to the proprietors from income tax under the words which granted them freedom from the payment of taxes, parliamentary or parochial. Lord Sterndale, in giving judgment (1), said: "It seems to me it is quite clear that the words 'payment of any tax, rate or assessment whatsoever, parliamentary or parochial' mean what they say, that the exemption is not to be confined to parochial taxation or parochial rating, but extends to general parliamentary taxation such as is defined in the cases to which I have referred, and such general parliamentary taxation includes the income tax." Although I think that case summarizes the law which had been previously stated in a number of cases, and is a logical conclusion of them, it seems to me that it is a very definite decision on this point that a "parliamentary tax" includes income tax; and, indeed, a tax, I think, must be a parliamentary tax, and if that includes income tax one comes back again to the point of whether or not the words which we have to interpret are apt to include income tax.

I have been through the authorities at some length because they have been fully discussed before us, but the point really is a short one. In my opinion, as the words stand having regard to the date at which the Shrewsbury Estate Act was passed, prima facie s. 7 was intended to deal with any deduction for income tax as provided for or made allowable by s. 102 of the Act of the previous year. From the number of cases which I have referred to it seems quite clear that where you get deductions in respect of taxes it is to be held that income tax is referred to. When you come to look at the Income Tax Acts themselves it appears to me that on a proper construction, income tax in this case is a deduction, although for certain purposes it may also be said to be a payment. As I have said, the learned judge had not the

(1) [1920] 3 K. B. 123.

advantage that we have had of having the matter so fully discussed or of having his attention called to some of the more recent cases. I confess that I do not quite agree with some of the statements or some of the propositions to which he gives his assent as to the working of the system of the Income Tax Acts, but I need not dwell upon that. For the reasons I have already given I think the interpretation we ought to place upon these words is that income tax is included, and that the appeal ought to be allowed.

WARRINGTON L.J. I am of the same opinion, and as we are differing from the judgment of the learned judge I propose to express the view at which I have arrived in my own words and as shortly as possible.

The appellant, the Dowager Countess of Shrewsbury and Talbot, is entitled under a grant made by virtue of powers conferred upon her husband by the Shrewsbury Estate Act, 1843, to a jointure charge upon the estates settled by that Act. The question is whether she is entitled to be paid the full amount of that jointure, that is to say 3000*l.*, or whether all she is entitled to receive from the persons in possession of the estate is 3000*l.*, less the income tax for the time being on that sum. [His Lordship then referred to the powers of jointuring conferred by the Act upon the owner in possession of the estates and continued:] The question we have to determine is one of construction simply. Are the persons in possession of the estates entitled to deduct from the jointure which they have to pay the amount of the income tax chargeable thereon?

At the date of the passing of the Shrewsbury Estate Act there was in existence a tax, which we all know has since that date been annually renewed, called income tax. The appellant says the income tax is a tax, and it certainly is. By virtue of the provisions of s. 102 of the Income Tax Act of 1842 the owners of the estate charged with a particular annuity are authorized to deduct thereout the amount of the income tax upon it, and it is provided that the jointress is to allow such deduction, and the persons charged with the

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duties, having made such deduction, are to be acquitted and discharged of so much money as that deduction shall amount unto as if the amount thereof had actually been paid unto the person to whom the payment of the annuity shall have been payable. The meaning of that provision is this. Under Sch. A of the Act the whole estate is subject to what is commonly called property tax, but is really only income tax under another name, but I think it is called income tax in the Act itself, and by the provisions of the Act a person entitled to an annuity such as this jointure is not to be separately assessed in respect of the tax. The owners of the estate are assessed to the tax, and for the purpose of that assessment they are not entitled to distinguish the annuity from the rents and profits of the estate. They are to be assessed to the whole of the rents and profits without taking out the annuity, and they have to pay to the Crown the whole of the taxes, which includes income tax on the annuity. But in the ordinary case they are entitled under the provisions to which I have just referred in paying the annuity to deduct the amount of income tax on it, and they are to be allowed that payment as if they had paid the annuity in full. In the absence of authority it would seem to me fairly clear that where an annuity is to be paid "clear of all deductions whatsoever for taxes or otherwise," if the persons whose duty it is to pay the annuity deduct from it the amount of the income tax upon it, they would be making a deduction which by the provision of the Act they are not entitled to make. In the case of an ordinary man, I think, knowing of the provisions of the Income Tax Act, 1842, and reading these words, it would be reasonably plain to his mind that if he deducts the amount of the income tax he is making a deduction for the purposes of the Act, and that is a deduction which the Act of Parliament says he is not to make. But there are no doubt authorities which have been accepted as good decisions for many years, and have been so accepted in this Court, which do cause a considerable amount of difficulty, but two principles emerge as the result of those authorities. One of those is—they are all authorities upon the construction of

wills I may say—that a mere gift of a clear annuity, or an annuity clear of all deductions, is not sufficient to discharge the annuitant to whom the annuity is paid of any liability under the Acts to pay the tax on his own income. The last case in this Court which affirms that principle is *In re Loveless*. (1) But another principle which I think emerges from those authorities is that the question is one purely of construction of the particular document in the case, and that if there appears on the face of that document an intention that income tax shall be included in the expression " deductions " for the purpose of the instrument which has to be interpreted, then it will be so interpreted; and I think if there is reference to taxes in connection with the expression " deductions," it may be and in some cases has been held to be enough to indicate the intention to which I have referred—namely, that although income tax is not usually included in the expression " deductions " unqualified, yet where there is that connection it may be so included. Instances to which the principle just referred to has been applied are found in *In re Bannerman's Estate* (2), in *Turner* v. *Mullineux* (3) and in *Peareth* v. *Marriott* (4), as decided by Bacon V.-C. In my opinion, therefore, Kay J. in *Gleadow* v. *Leetham* (5) was expressing a correct conclusion where he divided the cases into two classes, one in which there is nothing but the expression " clear annuity " or " clear of all deductions," and the other where the expression " deductions " is so connected with the word " taxes " as to indicate that the author of the instrument intended to include income tax amongst the things from which the annuitant in question was to be free.

The present case falls within the second of the two classes to which I have referred, and I am of opinion that I am entitled to construe those words as I have already said I would have construed them if I had heard nothing of the numerous cases which have been cited before us. I think

(1) [1918] 2 Ch. 1.
(2) 21 Ch. D. 105.
(3) 1 J. & H. 334.
(4) 22 Ch. D. 182.
(5) 22 Ch. D. 269.

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there is nothing in the authorities which prevents me from coming to that conclusion, but, on the contrary, that the authorities included in the second class of cases—namely, those in which the word "taxes" is actually used in connection with the expression "deductions," are strong enough to enable me to come to the conclusion to which I have arrived.

So far I have dealt only with the construction of the actual terms in which the power is given to charge the jointure in question, but it is said there are other expressions in the Estate Act which prevent one coming to the conclusion at which I have arrived, and reliance is placed upon ss. 9 and 10. I do not propose to read those sections again. All I wish to say about them is, that all difficulty in the construction or application of those sections disappears if you interpret the expression relating to the jointure used therein in the way in which the expressions are used, or as I think they ought to be interpreted in s. 7. If in s. 7 you accept the expression a jointure of 3000*l.* clear of all deductions for taxes as meaning 3000*l.* net and free from income tax, and interpret the 6000*l.* in s. 10 in the same way, as meaning 6000*l.* net without any deduction for income tax, the three sections fall into line, and can be construed without difficulty.

There are only two other points. It is said that the provision of s. 103 of the Income Tax Act renders void the provision that this jointure shall be free from income tax. The answer to that is that s. 103 is the result of a contract and agreement, and the tax to which we are giving effect is under a statute, and it is therefore not covered by the words in s. 103.

Then as to the words in s. 187, I agree with the Master of the Rolls that that section probably does not refer to such an annuity at all. If it does then the statutes which are referred to there are statutes which were already in operation at the time of the passing of the Act of 1842, and not statutes which were afterwards passed. To come to any other conclusion would be to hold that one session of Parliament had attempted to enact that statutes passed in subsequent sessions have an effect which, but for that provision, they would not have.

For these reasons, with respect to the learned judge, I think the decision was wrong and the appeal should be allowed, and the declaration made as asked by the appellant.

SARGANT L.J. We have here to find the true meaning of a particular expression used in s. 7 of the Shrewsbury Estate Act, 1843. In so doing we have, of course, to attribute the strict and primary meaning to the words employed in the section, unless from the context, coupled with the surrounding circumstances, it appears that the words have been used in a modified or different sense. Here the phrase in question is "clear of all deductions for taxes or otherwise." It is now well settled that income tax is not a deduction in the strict or proper sense. Under the machinery of Sch. A of the Act the owner is assessed on the whole value of the land and is recouped for any deductions in respect of annuities by being at liberty to retain, I use a neutral word for the moment, out of the annuities the tax at the appropriate rate. The result is not that he pays less than the full annuity but that he pays the bulk to the annuitant, and is deemed to pay the amount of the tax also, being in fact liable to pay to the Crown all tax moneys that he deducts which he has to pay on the assessment of the true value of the land. Hence a direction in a will or deed to pay an annual sum without any deduction is prima facie satisfied by the payment to the annuitant, minus the tax, and I think in this case it is right to say that when the owner of the lands had paid, taking the figure mentioned in argument, 2250*l.*, and had paid income tax on the whole of the lands, he had paid to her the 750*l.* also, which he had retained out of the 3000*l.*, and had in reality paid her 3000*l.* without deduction.

But though income tax is not a deduction in the result, and therefore not a deduction in the strict sense, still the process or method under Sch. A is a process by way of deduction. The word "deduction" is used throughout the relevant parts of the Act, and, therefore, the word "deduction" can very naturally, though with slight inaccuracy, be applied to the

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payment of the tax. A very usual form of words in legal documents is to pay an annual sum of this kind or a quarterly rent without any deduction except for income tax, and such a phrase, though not strictly accurate, is perfectly intelligible, and arouses, to my mind at any rate, no sense of contradiction or violent inconsistency.

Now to deal more closely with the phrase in question. Had it been "clear of all deduction for income tax or otherwise" there could be no question, the annuity would be relieved from its liability to undergo the process of deduction, though this may have only been a method, and though income tax was not strictly a deduction. What then is the effect of the larger and vaguer phrase "taxes"? There was no other tax at the time but land tax and income tax, and not only would land tax alone be insufficient to satisfy the plural word "taxes," but land tax itself was collected as a matter of method by deduction; and if taxes mean all taxes present and future, then the case seems to fall within the principle of *Pole-Carew* v. *Craddock* (1), a case which is stronger than the present one in that the statutory provision there was enacted long before the Income Tax Act of 1842. Here I think the dates are very strongly in favour of the appellant. The general Act was only a year old, and it imposed a tax which fell on rentcharges by means of a process of deduction, and in my judgment the words used in the Act of 1843 are clearly intended to point to the recent public legislation.

It is said that the Act of 1843 cannot be construed in this way, because that would be going back on the general legislation of 1842. This argument does not convince me. There is nothing in the Act of 1842 to prevent the division of a total income between several beneficiaries in such a way that the person receiving fixed income may have the benefit of receiving it as so absolutely fixed and invariable as to have his income tax provided for out of the total income. The remarks of Kindersley V.-C. in *Lord Lovat* v. *Duchess of Leeds* (2) at the conclusion of his judgment seem to me

(1) [1920] 3 K. B. 109. (2) 2 Dr. & Sm. 62.

entirely appropriate. Then comes the particular argument as to clauses 9 and 10. That argument really depends on two suggestions. The first suggestion is that the limits of total charging of the jointures spoken of do not apply to jointures of the same special character as the jointures mentioned in s. 7, and the second suggestion is that the creation of the jointure in cl. 7 is the creation of two charges, the first of 3000*l.* itself, and the second the amount charged necessary to defray the income tax. In my judgment neither suggestion is sound. What is authorized by s. 7 is the creation of a specially favourable annuity—namely, one that is exempt from the liability to have income tax deducted by the tenant for life when he comes to pay the charge, and on all ordinary principles of construction the superadded ss. 9 and 10 are dealing with annuities of the same character as those created under s. 7—namely, annuities with this special exemption. This view is supported by the omission of the words now in question in the case of annuities which had been created in satisfaction of obligations created in the settled estates before the passing of the Income Tax Act, 1842, and which had therefore become subject to the taxing provisions of that Act.

Finally I agree that s. 187 does not apply, for the reasons which have already been stated.

Appeal allowed.

Solicitors: *Nicholson, Freeland & Shepherd; Williams & James.*

G. A. S.

P. O. LAWRENCE J.

1923 Nov. 15, 16; Dec. 5.

ELLIS AND COMPANY'S TRUSTEE *v.* DIXON-JOHNSON.

[1923. E. 306.]

Bankruptcy—Speculative Account—Investments pledged to secure Current Balance due to Stockbrokers on Account of Dealings—Wrongful Sale of Shares by Pledgee—Right of Pledgee to recover Balance—Right of Pledgor on Payment to have pledged Securities returned—Breach of Contract—Anticipatory Breach—Damages for non-return of Securities—Account of mutual Dealings—Set-off—Date for taking Account—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 31.

The bankrupts were a firm of stockbrokers with whom the defendant had many years ago opened a speculative account, which was still current at the date of the bankruptcy. As security for any debit balance due from him on the taking of their monthly account, the defendant had deposited with the firm the indicia of title to various investments, which included shares in two rubber companies, the value of which was about two-fifteenths of the total value of all the investments pledged. In March and November, 1921, the firm without the knowledge or authority of the defendant sold the rubber shares. On February 16, 1922, a receiving order was made against the firm and on the same day they were adjudicated bankrupt, the effect of which was to close the defendant's account. On February 19, 1923, the trustee in bankruptcy of the firm rendered the defendant a final account which (after giving the defendant credit for the actual proceeds received by the firm in respect of the sales aforesaid, on the footing that the breach of the contract, if there was a breach, consisted in the sales of the shares) showed a balance due from the defendant.

In an action brought by the trustee to recover that balance, the defendant admitted indebtedness upon a proper account being stated, but denied the plaintiffs' right to sue, in face of his expressed intention not to return the shares; in the alternative, he claimed that under s. 31 of the Bankruptcy Act, 1914, he was entitled to set off against the balance on the account, when ascertained, the value of the shares at the mean market price of the day on which the shares ought to be returned, by way of damages for breach of the agreement to return the shares:—

Held, (1.) that the principle stated in *Walker* v. *Jones* (1866) L. R. 1 P. C. 50, 61, 62, that a mortgagee is not entitled to sue for the mortgage debt, if he is unable to return the mortgage security through having wrongfully parted with it, applies to investments as well as to real property; (2.) that the defendant, although he might have elected to treat the contract as rescinded and to claim damages as for an anticipatory breach, was, nevertheless, entitled to hold the plaintiff to his obligation under the contract to return the shares when the time for performance arrived; but that, as the value of the shares which had been sold was comparatively small in proportion to the total value of

the investments pledged and the shares were easily purchasable, the principle was only to be applied, in the present case, in a modified form, by allowing the defendant to set off against the ultimate balance to be found due on taking the account the value of the shares to be ascertained as on the day of the breach of the contract—namely, on the day when the shares ought to be returned to the defendant; and (3.) that under s. 31 of the Bankruptcy Act, 1914, the value of the shares to be ascertained according to the market price thereof on the day before the signing of the certificate must be set off against the claim of the trustee, notwithstanding that the defendants' claim to such set-off was made in an action and not by way of proof in the bankruptcy.

ACTION WITH WITNESSES.

The following facts are taken from the judgment of P. O. Lawrence J.:—

The bankrupts were stockbrokers with whom the defendant had many years ago opened a speculative account, which was still current at the date of their bankruptcy. As a security for any debit balance which might from time to time be owing by him on that account, the defendant had deposited with the bankrupts the indicia of title to a number of investments, consisting of debentures, bonds and shares of various companies, together with blank transfers to the approximate value of 15,000*l*. Amongst the shares so pledged were 2000 fully paid ordinary shares of 1*l*. each in a company called Rubber Plantations Investment Trust, Ld. (hereinafter referred to as "the rubber shares") and 4600 fully paid ordinary shares of 2*s*. each in a company called Kinta Kellas Rubber Estates, Ld. (hereinafter referred to as "the Kinta shares"). The proportion which the value of the rubber shares and the Kinta shares bore to the total value of the investments pledged was approximately two-fifteenths. Both the rubber shares and the Kinta shares were regularly dealt with and could be freely bought and sold on the London Stock Exchange.

The bargain arrived at between the defendant and the bankrupts, so far as material to be stated, was that the bankrupts should in each month render an account to the defendant, that the balance shown by each account should be carried forward to the next account, that interest at the

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rate of 1½ per cent. above bank rate should be charged on any debit balance, and that when the account was closed the bankrupts should render a final account and, on such final account being rendered, the defendant should pay the balance due from him, and thereupon the bankrupts should return to the defendant the investments which he had deposited with them by way of security.

In March, 1921, the bankrupts sold the whole of the rubber shares and 3600 of the Kinta shares, and in November, 1921, they sold the remaining 1000 of the Kinta shares. The shares were sold at the prices ruling on the Stock Exchange at the time of the sales—namely, 17*s.* 1½*d.* for the rubber shares, and 2*s.* 3*d.* for the Kinta shares. The sales were unauthorized, having been effected without the knowledge or assent of the defendant whilst his account was still open.

On February 16, 1922, a receiving order was made against the bankrupts, and on the same day they were adjudicated bankrupt; the bankruptcy operated to close the defendant's account. On February 16, 1922, the price of the rubber shares was 13*s.* 3*d.* to 14*s.* 3*d.* and the price of Kinta shares was 2*s.* to 2*s.* 3*d.* On April 27, 1922, the plaintiff, who was then unaware of the fact that the shares in question had been sold, wrote to the defendant informing him (inter alia) that the rubber shares and the Kinta shares had been pledged by the bankrupts with certain of their creditors. Later on the plaintiff discovered the true facts, and thereupon wrote a letter, dated August 21, 1922, to the defendant's solicitors informing them that the rubber shares and the Kinta shares had been sold during the year 1921. On August 22, 1922, the price of the rubber shares was 13*s.* 9*d.* to 14*s.* 9*d.* and the price of the Kinta shares was 2*s.* 4½*d.* to 2*s.* 7½*d.*

The defendant admitted that his solicitors had full authority to act for him in all matters relating to his account, and stated in the witness box that they did not inform him of the sale of the shares until November 10, 1922, at which date the price of the rubber shares was 21*s.* to 22*s.* and the price of the Kinta shares was 2*s.* 7½*d.* to 2*s.* 10½*d.* The defendant had at least one interview with his solicitors in the interval

between August 22, 1922, and November 10, 1922, and they had ample opportunity of communicating the fact of the sale to the defendant directly after they had received the plaintiff's letter of August 21. In those circumstances the Court found as a fact that full notice of the sales ought to be imputed to the defendant on August 22, 1922, and the Court declined to go into the question whether the information which his solicitors had received had or had not been communicated to him.

On February 19, 1923, the plaintiff rendered to the defendant what purported to be a final account in respect of the bankrupts' dealings on behalf of the defendant. In that account the plaintiff gave credit for the proceeds received by the bankrupts in respect of the sale of the rubber shares and of the Kinta shares as on the dates on which, and at the prices at which, these shares were sold. The balance shown to be due from the defendant on this account was 401*l.* 0*s.* 4*d.* On February 26, 1923, the writ in this action was issued claiming 429*l.* 17*s.* 7*d.* (made up of the balance of 401*l.* 0*s.* 4*d.* together with interest up to date) and also claiming interest until payment. On February 19, 1923, and at the date of the writ, the price of the rubber shares was 26*s.* 3*d.* to 27*s.* 3*d.* and the price of Kinta shares was 3*s.* 3*d.* to 3*s.* 6*d.*, and at the date of the trial the price of the rubber shares was 27*s.* 7½*d.* to 28*s.* 1½*d.* and the price of the Kinta shares was 2*s.* 10½*d.* to 3*s.* 1½*d.* The plaintiff, through his counsel, expressed his definite intention not to purchase any rubber shares or Kinta shares to replace those sold by the bankrupts.

Owen Thompson K.C. and *Hansell* for the plaintiff. The plaintiff is not bound to restore the shares, but is entitled to have an account taken on the footing of the defendant being given credit for the value of the shares sold, either at the date of the receiving order, or alternatively, at the date when the shares were sold, or when the defendant first had notice of the sale and to recover the balance on such account.

Jenkins K.C. and *Charles B. Marriott* for the defendant. The defendant admits indebtedness upon a proper account

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being stated; but on payment of the balance he is entitled to have the shares restored to him. Messrs. Ellis & Co., as pledgees of the shares, were in the position of equitable mortgagees and, in the absence of a date being fixed for payment, were only entitled to realize the shares on giving the defendant reasonable notice: *Deverges* v. *Sandeman, Clark & Co.* (1); *Stubbs* v. *Slater.* (2) Here, there was a special contract that the shares in question should not be sold, except with the defendants' consent. There is a good defence to the action both at law and in equity. The claim is one by a mortgagee for the money secured. The defendant is entitled to redeem, and upon redemption to have the securities restored to him; and the plaintiffs' refusal, without any valid excuse, to return the shares, upon a proper tender of the amount due to him, is a good defence to the action: *Walker* v. *Jones* (3); *Kinnaird* v. *Trollope.* (4) In the alternative the defendant claims to be entitled to set off against the balance of the account, when finally ascertained, the value of the shares, by way of damages for breach of the contract to return the shares. It is necessary that an account should be taken of the balance due from the defendant; because, until that account has been taken, it is not possible for the defendant to perform his part of the contract by tendering the amount due from him. The bankrupts committed an anticipatory breach of the contract as mortgagees of the shares when they sold them and put it out of their power to restore the shares in any event; but the defendant elects to hold them to their bargain and to claim damages for breach of their contract as mortgagees to return the shares. The value of the shares ought to be estimated at their price on the day of the breach of the contract—that is, when they ought to be returned. The proper date for ascertaining the damages is the date when the balance due on the account has been ascertained. The date of the receiving order is the date to be regarded for the purpose of seeing whether there existed mutual dealings between the parties and whether they gave

(1) [1902] 1 Ch. 579.
(2) [1910] 1 Ch. 632.
(3) L. R. 1 P. C. 50.
(4) (1888) 39 Ch. D. 636.

rise to a right of set-off, but that does not affect the question at what date the damages are to be fixed. The liability may be contingent at the date of the receiving order. Here, at the date of the receiving order, there existed mutual dealings. The liability of the bankrupts, owing to the sale of the shares, falls within the mutual credit clause: s. 31 of the Bankruptcy Act, 1914. The liability arose out of the contract. In *Tilley* v. *Bowman* (1) a claim for unliquidated damages for a fraudulent misrepresentation on the sale of a chattel was allowed to be set off. True it is that the date of the receiving order is the time for lodging a proof in the bankruptcy for unliquidated damages, but the measure of the damages may be ascertained after that date: *In re Daintrey* (2); *In re Taylor.* (3) The damages here cannot be ascertained until an account has been taken. Under s. 31 of the Act of 1914 the defendant is entitled to set off the amount of the balance so to be ascertained, whether that balance is claimed in an action or by way of proof in the bankruptcy: *In re Daintrey.* (2) A liability contingent at the date of the adjudication which ripens into a debt during the bankruptcy is provable according to the provisions of s. 31 of the Bankruptcy Act, 1914: *Macfarlane's Claim.* (4) The defendant is entitled to be placed in the same position in which he would have been if the shares had been replaced at the time when he redeems the securities. In the alternative, the value of the shares for the purpose of set-off should be calculated at the price ruling on the day of the trial or of the issue of the writ: *Shepherd* v. *Johnson* (5); *Owen* v. *Routh* (6); *Murray* v. *Hewitt.* (7) In *Michael* v. *Hart & Co.* (8) the plaintiff was held entitled to insist on performance of the defendant's contract on the settling day and to measure the damages with reference to the prices of the shares at that date.

Owen Thompson K.C. in reply. The point is a new one—

(1) [1910] 1 K. B. 745.
(2) [1900] 1 Q. B. 546.
(3) [1910] 1 K. B. 562.
(4) (1880) 17 Ch. D. 337.
(5) (1802) 2 East, 211.
(6) (1854) 14 C. B. 327.
(7) (1885) 2 Times L. R. 872.
(8) [1901] 2 K. B. 867; [1902] 1 K. B. 482.

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namely, whether the principle recognized in *Kinnaird* v. *Trollope* (1), *Walker* v. *Jones* (2), *Rourke* v. *Robinson* (3) and *In re Hoyles* (4), that a mortgagee suing for the debt must be in a position to restore his security, is applicable to investments pledged by way of security; in all the authorities cited the subject matter of the security was real estate. But it is submitted that, if it applies to a pledge of shares, the principle ought not to be strictly applied in a case where the security is easily purchasable, as the shares in question were, and where the mortgagee has sold only an inconsiderable part of his security. The present case is, on those grounds, distinguishable from cases where a Court of equity will not allow a mortgagee to sue on his bond, unless he is in a position to hand over the title deeds or, will not allow a mortgagee to proceed on his collateral securities when he has put it out of his power to reconvey the mortgaged property, as in *Schoole* v. *Sall* (5) and *Lockhart* v. *Hardy*. (6) Where a mortgagee has taken to the whole or the major part of his security he will not be allowed to sue for the debt, because he has elected to stand upon his security as satisfaction for his debt: *Palmer* v. *Hendrie*. (7) That every mortgagee has a right to have a reconveyance of the mortgaged property, upon payment of the money due under the mortgage, is based upon the principle of election: *Walker* v. *Jones*. (2) But it would be contrary to sound principle to hold that there has been an election where a mortgagee has sold only an inconsiderable part of his security, as in the present case. When a mortgagee conveys away the mortgaged property he kills the equity of redemption and may not then sue for his debt. In *Hornby* v. *Matcham* (8) a mortgagor was allowed compensation for the loss of the title deeds and to set it off against the amount found due from him under the mortgage. A mortgagor seeking to redeem was held to be entitled to be indemnified against their loss in the event of his being unable

(1) 39 Ch. D. 636.
(2) L. R. 1 P. C. 50.
(3) [1911] 1 Ch. 480.
(4) [1911] 1 Ch. 179, 184.
(5) (1803) 1 Sch. & Lef. 176.
(6) (1846) 9 Beav. 349.
(7) (1859) 27 Beav. 349; (1860) 28 Beav. 341.
(8) (1848) 16 Sim. 325.

to recover the deeds by action: *Lord Midleton* v. *Eliot* (1) and *James* v. *Rumsey*. (2)

As to the date when damages are to be assessed: where the security has been dealt with, whether in breach of contract or by wrongful conversion, damages must be assessed as at the date of the breach or the wrongful conversion—that is, when the shares were wrongfully sold. The breach is complete and the damages are to be assessed on the same footing in the case of a sale of stock as in the case of a sale of a chattel: *Di Ferdinando* v. *Simon, Smits & Co.* (3) The subsistence of the relation of mortgagor and mortgagee does not affect the question at what date damages ought to be measured; the account as between mortgagor and mortgagee can be adjusted. In *S.S. Celia* v. *S.S. Volturno* (4) Lord Sumner said: "The matter may be tested in this way. Suppose that, as an incident of the collision, some seamen belonging to the *Celia* had taken possession on behalf of her owners of a parcel of Italian currency notes, the property of the owners of the *Volturno*, and that the former had received and kept it. The owners of the *Volturno* could have claimed damages for conversion of the notes or their return with damages for their detention, as they chose. In the first case the value of the notes would be taken and exchanged into sterling as at the date of the conversion, and as the foundation of the damages in the second case the same date would have been taken." Those observations are applicable here. There is no difference between contract and tort: the breach happened on the conversion of the shares, and the damages are fixed then and must be estimated then.

[P. O. LAWRENCE J. The sale took place long before the mortgagor was aware of the sale.]

In that case, it may be that the damages must be ascertained as at the date when the sale first came to the knowledge of the mortgagor. The question of knowledge was not raised in *British American Continental Bank. Goldzieher and*

(1) (1847) 15 Sim. 531.
(2) (1879) 11 Ch. D. 398.
(3) [1920] 3 K. B. 409.
(4) [1921] 2 A. C. 544, 555, 556.

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Penso's Claim. (1) The principle of *Di Ferdinando* v. *Simon, Smits & Co.* (2) is not dependent upon the form of procedure and applies to a claim to prove in a winding up. It is not disputed that the defendants' claim is within the mutual credit section of the Act. At the date of the receiving order the account was closed and the rights of the parties are then crystallized. The trustee may then bring an action for the balance due on the security and the mortgagor must be deemed to have redeemed as at that date, and the question of damages must be ascertained as at that date. The defendant is not entitled to increase his claim in consequence of a subsequent rise in the value of the shares. The plaintiff's obligation was prospective; if it became an attaching obligation and would result in a money claim, it would be estimated under s. 31 of the Act, as at the date of the receiving order, and, if it arose out of mutual dealings, it would be the subject of set-off: *In re Taylor.* (3)

Cur. adv. vult.

Dec. 5. P. O. LAWRENCE J. In this case the trustee in bankruptcy of Ellis & Co. sues the defendant for a sum of 429*l.* 17*s.* 7*d.*, alleged to be the balance of moneys paid by the bankrupts for the purchase of shares for the defendant, and for interest as agreed. The defendant admits that he is indebted to the estate of the bankrupts in respect of their dealings on his behalf, but disputes the right of the plaintiff to sue for such indebtedness in the events which have happened—namely, the unauthorized sale by the bankrupts of certain shares pledged with them by way of security, and the inability or unwillingness of the plaintiff to return such shares on payment of the amount due. The defendant alternatively claims to set off the value of the shares wrongfully sold, and raises a further minor point as to the rate of interest sought to be charged against him.

The facts are not seriously in dispute. [His Lordship then stated the facts as above set out and continued:] The

(1) [1922] 2 Ch. 575. (2) [1920] 3 K. B. 409.
(3) [1910] 1 K. B. 562.

defendant has throughout been willing to pay any balance which may be due from him on a proper account being stated, but has always insisted, and still insists that, on payment of such balance, he is entitled to have restored to him 2000 rubber shares and 4600 Kinta shares. He further claims that, in face of the plaintiff's expressed intention not to restore such shares, the plaintiff is not entitled to sue for the balance of the account at all. Alternatively, the defendant contends that he is entitled to set off against the balance of the account, when finally ascertained, the value of the 2000 rubber shares and of the 4600 Kinta shares calculated at the mean price ruling on the day on which they ought to be returned to him, or alternatively on the day of the trial, or alternatively on the day when the writ was issued, by way of damages for the breach of the agreement to return the shares. The plaintiff, on the other hand, contends that he is entitled to have an account taken on the footing of the defendant being given credit in such account for the value of the shares, either at the date of the receiving order, or alternatively at the date when the shares were sold, or alternatively on the day when the defendant first had notice of the sale, and to recover from the defendant the balance which may be found due from him on taking such account without restoring the shares to him.

The principle that a mortgagee will not be permitted to sue his mortgagor for the mortgage debt, if he has parted with the mortgaged property otherwise than in exercise of a power of sale or with the direct concurrence of the mortgagor, is far too well established to be questioned in this Court. This principle is founded on the right which every mortgagor has to have a reconveyance of the mortgaged property, upon payment of the money due on the mortgage, and upon the duty with which every mortgagee is charged of making such reconveyance upon such payment being made: per Turner L.J. in *Walker* v. *Jones*. (1) If a mortgagee, although unable to perform this duty, insisted on suing his mortgagor at law on the covenant, the Courts of equity interfered in the

(1) L. R. 1 P. C. 50, 61, 62.

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mortgagor's favour : per Stirling J. in *Kinnaird* v. *Trollope*. (1) The principle extends to the case where a mortgagee, having sold the estate after foreclosure, sues only for the difference between the debt and the price of the estate sold, because this would be obtaining the full amount of the debt taking the value of the estate as part, thus altering the nature of the contract between the parties : per Lord Langdale M.R. in *Lockhart* v. *Hardy*. (2) In *Palmer* v. *Hendrie* (3) Sir John Romilly M.R. applied the principle to a case where the mortgagee had effected a partial alienation of the estate by joining with the transferees of the equity of redemption in granting leases at a peppercorn rent of part of the mortgaged property. During the argument I was referred to the case of *Hornby* v. *Matcham* (4), but that case, in my opinion, does not touch the principle which I am considering. There the executors of a mortgagee were held entitled to a foreclosure decree, notwithstanding that the mortgagee had burnt the title deeds, on the terms of a sufficient sum being set off against the mortgage debt by way of compensation for the destruction of the deeds. The executors were not suing the mortgagor for payment of the mortgage debt and, apparently, the mortgagor never disputed the mortgagee's right to a foreclosure decree on making sufficient compensation ; moreover, the mortgagee had not parted with any estate or interest in the mortgaged property. I am not aware of any case in which the principle has been applied to a pledge of investments in which there is a free market. In all the cases bearing upon the question now under consideration to which my attention has been called, the mortgaged property consisted of, or comprised, land or an interest in land, but I see no reason why the principle should not, in a proper case, be applied where the mortgaged property consists of investments. In such a case the relation of mortgagor and mortgagee undoubtedly exists : see *Stubbs* v. *Slater* (5) ; and the principle depends upon this relation and

(1) 39 Ch. D. 636.
(2) 9 Beav. 349, 357.
(3) 27 Beav. 349 ; 28 Beav. 341.
(4) 16 Sim. 325.
(5) [1910] 1 Ch. 632, 639.

not upon the nature of the mortgaged property. In my judgment, however, the principle is not inflexible and will bend to special circumstances. It would, I think, be strange if the Court were bound to apply the principle strictly to every case, whatever the facts might be, especially where such application would or might result to the serious prejudice of the creditors of an insolvent mortgagee and the mortgagor could by a less strict application of the principle be placed in just as good a position as if the mortgaged property had been restored to him.

In the present case the circumstances are, in my opinion, special, in that the bankrupts have wrongfully sold only a comparatively small proportion of the pledged investments, and the investments so sold consisted of shares in which there was, and still is, a free market on the Stock Exchange. In my judgment the marketable quality of the investments sold has a vital bearing on the question whether the Court ought to insist upon a strict application of the principle. Further, I am of opinion that the fact that the plaintiff is suing in his character as trustee in bankruptcy and was himself no party to the wrongful sale, forms an element which the Court may legitimately take into consideration, notwithstanding that the trustee, in a case like this, has no higher rights than the bankrupts. That some modification of the principle would be reasonable, in the circumstances of the present case, is not disputed by the defendant. It was conceded on his behalf that it would be stretching the principle too far if the Court were to hold that, because the plaintiff was unable to restore the identical shares which the defendant had pledged, therefore the plaintiff could not maintain any action for the balance of the account. It was contended, however, that what the plaintiff ought to have done before bringing his action was to have purchased 2000 fresh rubber shares and 4600 fresh Kinta shares to replace those which the bankrupts had sold, so that he might be in a position to transfer such fresh shares to the defendant, if and when the latter paid the balance of the account, and that, until such fresh shares had been purchased, the plaintiff ought not to be permitted to sue

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the defendant. In my opinion, the concession thus made does not fully meet the justice of the case, although it goes some way towards doing so, and I think that, in order to do complete justice, the modification of the principle ought to be extended one step further. To compel a plaintiff to purchase fresh shares in order to replace marketable shares improperly sold before suing for an admitted balance of an account, which balance might never be recovered, does not seem to me just or reasonable. I do not for a moment question the solvency of the defendant, but am merely testing the principle. It seems to me that, in a case like the present, the defendant would suffer no injury or damage whatever if the price of the shares on the day on which they ought to be restored to him were ascertained and set off against the ultimate balance found due from him. By setting off such price the defendant will be completely compensated for the loss which he will sustain by the non-return of the shares. If the trustee had bought shares before he commenced his action, the defendant's ultimate balance would not be reduced by such a set-off as I have mentioned, and, therefore, his indebtedness to the bankrupts' estate would be greater by the amount of the price of the shares at the date of such set-off, with the result that the defendant, if he so desires, can purchase fresh shares in the place of the sold shares with the money which he would save by the set-off and which he would otherwise have to pay to the plaintiff. On the other hand, should a defendant in similar circumstances be unable to pay the balance, the plaintiff would be saddled with shares which he does not want and which he would have to sell again in order to apply the proceeds in payment of the debt.

For these reasons I am of opinion that the principle contended for by the defendant ought, in the special circumstances of this case, to be applied only in the modified form of imposing such a set-off as a condition of allowing him to sue for the balance of the account.

The main contention of the plaintiff has been that he is entitled to sue for the balance of the account without restoring the shares on his merely giving credit in such account

for damages for breach of contract which he admits the defendant is entitled to set off. He further contends that the wrongful sale of the shares constituted the breach and that therefore the damages were fixed once and for all at the date when the shares were sold, or, if that be not the true view, then that the damages were fixed at the date when the defendant first had notice of the sale or, at latest, at the date of the receiving order.

In my judgment, the contentions thus put forward are ill-founded. In the first place, they seem to me to entirely ignore the fact that the relation of mortgagee and mortgagor subsisted between the parties and, in the next place, they erroneously fasten upon the wrongful sale of the shares as the breach, instead of the non-return of the shares on the day when they ought to be returned.

Even if this case were treated as one merely of cross-demands, apart from the relation of mortgagor and mortgagee, I think that the plaintiff has misconceived his position, and that almost the same result would be reached as that which, in view of the relationship which subsisted between the parties, I have held to be the true result. That damages are fixed once and for all at the date of the breach is not disputed: see *S.S. Celia* v. *S.S. Volturno* (1); but, according to the terms of the contract in this case, the plaintiff is not obliged to return the shares, until the final account has been rendered and the defendant has paid the balance due from him. Therefore, the breach for which the defendant will be entitled to damages will be the failure to return the shares when a proper final account has been stated and when the defendant has paid the balance owing on such account. No doubt the sale of the shares by the bankrupts amounted to an anticipatory breach of the contract going to the whole consideration, but it is well established that such a breach has not of itself the effect of rescinding the contract, for there must be two parties to a rescission; the other party to the contract has, no doubt, the right to treat the repudiation of the contract as a definitive breach of it and thereupon

(1) [1921] 2 A. C. 544.

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to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it; on the other hand, he may refuse to treat the contract as rescinded and hold the party repudiating the contract to his obligation when the time fixed for performance arrives: per Collins M.R. in *Michael* v. *Hart & Co.* (1) In the present case the defendant never knew of the sale of the shares until long after it had been effected and, on learning the facts, he did not exercise his option to treat such sale as a definitive breach. The defendant has all along insisted upon the obligation imposed by the contract upon the bankrupts to return the shares at the proper time and has refused to treat the contract as rescinded. In these circumstances the damages, in my judgment, would be measured by the price of the shares when they ought to be returned—namely, on the day when the balance was ascertained and became payable. It is then that the defendant, for the first time, would be in a position to pay his debt and demand the return of the shares. But, even if the defendant had accepted the repudiation and were claiming to set off damages for the anticipatory breach of contract, it seems to me that the damages would still have to be measured in reference to the date on which the contract would have to be performed: see *Frost* v. *Knight* (2) and *Millett* v. *Van Heek & Co.* (3)

The contention that the date of the receiving order is the correct date on which the damages ought to be ascertained, and that therefore the price of the shares on that day is the relevant price and determines the amount of the damages, seems to me to be founded on a misapprehension of the effect of the bankruptcy law. No doubt the date of the receiving order is the date for ascertaining what provable debts there were against the bankrupts' estate and what mutual debts, credits and dealings were existing between the bankrupts and other persons: per Lindley M.R. in *In re Daintrey.* (4) Further, there is no doubt that a contingent claim for unliquidated damages is a provable debt and its amount has to

(1) [1902] 1 K. B. 482, 490.
(2) (1872) L. R. 7 Ex. 111.
(3) [1921] 2 K. B. 369, 377.
(4) [1900] 1 Q. B. 546, 572.

be estimated as at the date of the receiving order. That, however, does not mean that the effect of the receiving order is to accelerate the happening of the contingency, so as to fix the amount of the defendant's claim on the basis of the contingency having happened on the day of the receiving order, which is, in effect, what the plaintiff's contention amounts to, when asking the Court to measure the defendant's claim for damages by the price of the shares on the day of the receiving order. The true rule as to proving contingent liabilities against a bankrupt's estate is, in my opinion, as follows: The claim must be stated as on the day of the receiving order: if, when the proof is lodged, the contingency has not happened, the amount of the claim must be estimated as accurately as possible; if the contingency happens before the proof is lodged, that fact is pro tanto evidence of the true value of the claim as at the date of the receiving order, and there will, as a rule, be no difficulty in arriving at the amount of the claim; if the contingency happens after the proof is lodged and it appears that the amount at which the damages have been estimated is below the true value, the creditor will be allowed to amend his proof or lodge a fresh proof at any time during the continuance of the bankruptcy, but not so as to disturb prior dividends: see *Macfarlane's Claim* (1) and *In re Law Car and General Insurance Corporation.* (2)

The defendant's claim for damages in the present case, being a provable debt, can, under s. 31 of the Bankruptcy Act, 1914, be set off against the claim of the trustee for the balance of the account, although such right of set off is asserted in this action and not by way of proof: see *Peat* v. *Jones & Co.* (3) and *In re Daintrey.* (4) The damages for which the defendant would be entitled to prove are the damages which would result from the non-return of the shares at the agreed time, and the amount of his claim would therefore be determined by reference to the price of the shares ruling on the day when they ought to be returned, less some

(1) 17 Ch. D. 337.
(2) [1913] 2 Ch. 103.
(3) (1881) 8 Q. B. D. 147.
(4) [1900] 1 Q. B. 546.

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discount for the period between that day and the receiving order.

Thus it will be seen that practically the same result is arrived at whether this case is treated merely as one of cross-demands without regard to the relation of mortgagor and mortgagee subsisting between the parties, or whether such relationship is taken into account. Be that as it may, however, I have come to the conclusion that the relation of mortgagor and mortgagee existing between the parties cannot properly be ignored and that the plaintiff is only entitled to sue for the balance of the account on condition of his making full compensation to the mortgagor in the manner I have indicated.

There remains to be considered the question of interest. I hold that it is clearly established that the defendant agreed to pay interest on the balances from time to time owing by him at the rates and in the manner charged in the accounts rendered to him. Not only did the defendant never demur to the rate of interest which was regularly charged in the monthly accounts, but on at least one occasion the high rate of interest was expressly adverted to by the bankrupts in their correspondence with the defendant and, so far from disputing the charge, the defendant sent a cheque for 300*l.* on account of such interest. In these circumstances it is hopeless to contend that he did not agree to pay the rate of interest charged. I therefore hold that the plaintiff is fully justified in continuing to charge the same rate of interest in the final account.

In the result I propose to make an order first, that an account be taken of what is due from the defendant to the estate of the bankrupts in respect of the sale and purchase of shares on his account, and that in taking such account the defendant be debited with interest on all balances at 1½ per cent. above bank rate until payment and be credited with all dividends which the bankrupts and the plaintiff would have received on the 2000 rubber shares and 4600 Kinta shares, if they had not been sold; secondly, that an inquiry be made what is the value of 2000 rubber shares and 4600 Kinta shares

at the date of the signing of the certificate, such value to be determined by reference to the mean prices ruling on the day before such certificate is signed; and thirdly, that the amount so found to be the value of the 2000 rubber shares and 4600 Kinta shares be set off against the amount found due from the defendant under the account hereby directed and that the balance be certified. The costs of this action will be reserved until after the master has made his certificate, and either of the parties will be at liberty to apply touching the certified balance and as to the payment of the costs of this action and generally.

Solicitors for the plaintiff: *Piesse & Sons.*
Solicitors for the defendant: *Vandercom, Stanton & Co.*

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[1923. S. 301.]

Tenant for Life and Remainderman—Will—Bequest of "Dividends, Bonuses and Income" of certain Shares—Capitalized Profits—Bonus Shares in lieu of Cash.

A testatrix, who died in 1917, bequeathed to trustees 300 ordinary shares in a limited company upon trust to pay the "dividends, bonuses and income" thereof to R. S. and J. S. his wife during their lives and to the survivor of them during the life of such survivor, and after the death of the survivor the trustees were directed to hold the shares upon trust for the H. Infirmary absolutely.

The company had accumulated out of profits a large reserve fund and also had in hand certain undistributed profits not carried to reserve. In 1919 the company proposed to distribute, by way of bonus, amongst its shareholders the sum of 634,980*l.* The method adopted by the company was to capitalize that sum, and instead of distributing it in the shape of cash, to distribute it in the shape of fully-paid shares. The transaction was carried out by appropriate resolutions and recorded in an agreement between the company and its shareholders which, after reciting the accumulations and the company's proposal to distribute the sum as bonus, provided that the company would pay the sum by the issue and allotment of fully-paid shares, and the shareholders agreed to accept

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those shares in satisfaction of their respective proportions of that sum. On July 31, 1919, during the lives of the tenants for life, the company allotted to the trustees 9000 *l.* fully-paid bonus shares, the proportion to which they were entitled in respect of the 300 shares bequeathed to them.

A summons was taken out to have it decided whether the bonus shares so allotted to the trustees ought to have been transferred to the tenants for life or were rightly retained by the trustees as capital subject to the trusts of the will. R. S. died after the allotment of the bonus shares to the trustees, leaving his wife surviving him :—

Held, by P. O. Lawrence J., that the fact that the company capitalized the bonus and satisfied it by the allotment of shares did not prevent the bonus from passing to the tenants for life, as the bequest, upon its true construction, was wide enough to include a capital bonus ; and, in the event which happened, the shares belonged to J. S., the surviving tenant for life.

Held, by the Court of Appeal, applying the tests laid down in *Bouch* v. *Sproule* (1887) 12 App. Cas. 385, and *Inland Revenue Commissioners* v. *Blott* [1921] 2 A. C. 171, that as a question of fact the issue of the new shares by the company must be regarded as a distribution of capital, and not of income ; and that in the construction of the will the words " dividends bonuses and income " did not cover the shares in question so as to pass them to the tenant for life.

Decision of P. O. Lawrence J. reversed.

ADJOURNED SUMMONS.

Charlotte Jane Speir by her will, dated September 17, 1917, after appointing executors and trustees thereof, bequeathed to her trustees 300 ordinary shares in the Lancaster Steam Coal Collieries, Ld., upon trust to pay the " dividends, bonuses and income " thereof to Robert Speir and Jane Speir his wife during their lives and to the survivor of them during the life of such survivor, and after the death of the survivor the trustees were directed to hold the said shares upon trust for the Harrogate Infirmary absolutely.

The testatrix died on February 11, 1918, possessed of 700 ordinary shares of 5*l.* each in the Lancaster Steam Coal Collieries, Ld. The company had from time to time during several years out of profits, over and above the dividends, distributed cash bonuses. It had also accumulated a large reserve fund, and had in hand certain undistributed profits not carried to reserve.

In 1919, the company proposed to distribute, as a bonus amongst its shareholders, the whole of that reserve fund

and part of the undivided profits in hand, amounting altogether to the sum of 634,980*l.* At meetings of the company's shareholders held in March and April, 1919, with the view of carrying out that proposal, resolutions were passed whereby, first, a new article was added to the company's articles of association which empowered any general meeting declaring a dividend to direct payment of such dividend wholly or in part by the distribution of specific assets and, in particular, of paid-up shares, and, secondly, the capital of the company of 200,000*l.* was increased to 1,250,000*l.* by the creation of 1,050,000 new shares of 1*l.* each, to make provision (inter alia) for the distribution of the reserve fund and undistributed profits by the issue of bonus shares; and a further resolution was passed that the sum of 634,980*l.*, being part of the undivided profits of the company standing to the credit of the company's reserve fund and profit and loss account, should be capitalized and distributed as a bonus amongst the holders of the ordinary shares in proportion to such shares held by them respectively, and that the directors should be authorized to distribute amongst them 634,980 ordinary shares of 1*l.* each. At subsequent meetings in May and June, 1919, a further resolution was passed whereby the original 40,000 5*l.* shares were divided into 200,000 1*l.* shares fully paid. The whole transaction was recorded in an agreement dated June 13, 1919, made between the company and its shareholders, which was registered with the Registrar of Joint Stock Companies, whereby, after a recital of the proposal to distribute, as bonus, amongst the shareholders the sum of 634,980*l.* rateably in proportion to the shares held by them respectively, it was agreed that the company should pay to the shareholders that sum by the issue and allotment to them of the same number of fully-paid 1*l.* shares to be distributed amongst them rateably in proportion to the number of shares held by them respectively, and that the shareholders should accept such shares in full satisfaction of their respective shares of that sum.

On July 31, 1919, the company allotted to the trustees of the will 9000 1*l.* bonus shares, being the proportion of the

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bonus shares to which they were entitled in respect of their 1500 *l.* shares under the resolutions and agreement.

The trustees retained the shares until June, 1920, when they sold the same at a premium and reinvested the proceeds thereof, and paid to the tenants for life the income only of the shares during their retention and of the investments afterwards representing the same.

On February 20, 1922, Robert Speir died, leaving his wife surviving him.

This summons raised the question whether, upon the true construction of the will of the testatrix, the bonus shares allotted to the trustees ought to have been transferred to the tenants for life, or were rightly treated as capital subject to the trusts of the will.

The summons was heard before P. O. Lawrence J. on Oct. 16, 1923.

Dighton Pollock for the trustees.

Jenkins K.C. and *F. McMullan* for the surviving tenant for life. The 9000 bonus shares allotted to the trustees belonged to the tenants for life. The word " bonuses " in the bequest to the tenant for life is wide enough to comprise a bonus whether paid in cash or in shares. It could not be denied that the tenants for life would have been entitled, had the bonus been paid in cash; that it was paid in the shape of shares can make no difference: *In re Mittam's Settlement Trusts.* (1)

Owen Thompson K.C. and *Horace Freeman* for the trustees of the Harrogate Infirmary. On the proper construction of the bequest " bonuses " must be restricted to cash bonuses, owing to the collocation of the words " dividends, bonuses and income " of the shares. The word, as it appears in this bequest, does not comprise a capital bonus. In the present case the dividends have been capitalized, and therefore the shares which were allotted to the trustees of the will were a capital bonus and must be dealt with by them as an addition to the capital of the settled shares. The effect of the

(1) (1858) 4 Jur. (N. S.) 1077.

agreement between the company and its shareholders was that the company agreed to pay cash to the shareholders, who agreed to accept shares in lieu thereof.

P. O. LAWRENCE J. In my judgment the shares in question passed to the first defendant jointly with her late husband by reason of the express words contained in the will. The will gave the 300 shares to trustees upon trust to pay the dividends "bonuses" and income thereof to Robert Speir and Jane Speir his wife during their lives and to the survivor of them during the life of such survivor. Then after the death of the survivor, the 300 shares were to be held upon trust for the Harrogate Infirmary. The shares in question were distributed by the company during the joint lives of Robert Speir and Jane Speir. It is contended that those shares were not bonuses within the meaning of the will.

Now, the facts regarding those shares are as follows: The company out of its profits had accumulated a large general reserve fund, and it also had in hand certain undistributed profits not carried to any reserve fund. In the year 1919, the company was minded to distribute, by way of bonus, amongst its shareholders the sum of 634,980*l*. The method adopted by the company for the distribution of this bonus was to capitalize the sum representing the bonus, and, instead of distributing it in the shape of cash, to distribute it in the shape of fully paid shares. The transaction was duly carried out by appropriate resolutions and, further, was recorded in an agreement of June 13, 1919, between the company and the shareholders, clearly setting out its true nature. The agreement recited that the company had accumulated profits by way of general reserve and also by way of undistributed profits not carried to reserve; that the company proposed to distribute the sum I have mentioned as bonus amongst the shareholders, and then the agreement provides by the operative clause that the company will pay the sum by the issue and allotment of fully paid shares, and the shareholders agree to accept those shares in satisfaction of their respective proportions of that sum.

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On those facts, it seems to me clear that the shares in question were allotted to the trustees in satisfaction of their proportion of the cash bonus, which the company had determined to distribute, and, therefore, that the shares were allotted to the trustees as a bonus in respect of the 300 shares the subject matter of the gift. In my judgment the fact that the company had capitalized the bonus and had satisfied it by the issue and allotment of shares did not prevent the bonus from passing to the tenants for life. The bequest in plain language gives, not only the dividends and income, but also the bonuses of the shares to the tenants for life. I find nothing in the will to confine such gift to "income" bonuses or to "cash" bonuses, as distinguished from bonuses which the company has capitalized or which the company satisfied by the allotment of shares.

In the result, I hold that the shares in question passed to the two tenants for life as joint tenants and, in the events which have happened, now belong to the first defendant Jane Speir as the survivor.

H. C. H.

The trustees of the Harrogate Infirmary appealed. The appeal was heard on Dec. 18, 1923.

Archer K.C. and *Horace Freeman* for the appellants. Upon construction of the particular phrase in the will, "upon trust to pay the dividends, bonuses and income" of the shares, to the tenants for life, the word bonuses means cash bonuses only, it does not include a capital bonus. If the direction had been to pay the income to the tenants for life it could not have been contended, having regard to what the company has done, that the shares would have passed to the tenants for life. "Bonus" is a perfectly equivocal word. It is said that it includes everything which the company calls a bonus. The Court will have regard to what the company has done. This is really a capital and not an income bonus. The question whether profits remain income or have been capitalized is one of fact: *Bouch* v. *Sproule*. (1) This was

(1) 12 App. Cas. 385.

an extreme case of capitalization by the company. There is a great contrast between the cash bonuses issued by the company on former occasions and this particular capital bonus. It is not profits to which the tenants for life are entitled: *In re Armitage.* (1)

[SARGANT L.J. referred to *Inland Revenue Commissioners* v. *Blott.* (2)]

Jenkins K.C. and *F. McMullan* for the respondent, the surviving tenant for life. The question is whether the word "bonuses" is sufficient to cover these bonus shares. It is submitted that the word is wide enough to include all bonuses, whether paid in cash or in shares. If the bonus had been paid in cash it would clearly have gone to the tenants for life, and the fact that the company capitalized it and satisfied it by the allotment of shares, which the shareholders agreed to accept in lieu of cash, is immaterial.

[WARRINGTON L.J. Is the effect of the bequest to give to the tenants for life something which but for the provisions of the will would be an accretion to capital?]

On the construction of the will the bonus shares in question belong to the surviving tenant for life: *In re Mittam's Settlement Trusts.* (3)

[They also referred to *Brander* v. *Brander.* (4)]

Dighton Pollock for the trustees.

POLLOCK M.R. This is an appeal from the judgment of P. O. Lawrence J., who had to decide what is the proper construction of the will of Mrs. Speir, and to decide what was the effect of a bequest made by her of 300 ordinary shares in the Lancaster Steam Coal Collieries, Ld., in which Mrs. Speir had shares for a very considerable time before her death. The company had been capitalized at a very small sum, so that it was enabled to pay very large dividends, and in some cases the company had paid not merely what was known as dividend, but had added to the dividend a bonus, so that the distribution took the form both of dividend and bonus. [His Lordship stated the facts as to the dealings

(1) [1893] 3 Ch. 337, 346.
(2) [1921] 2 A. C. 171.
(3) 4 Jur. (N. S.) 1077.
(4) (1799) 4 Ves. 800.

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by the company with its capital and the distribution of the reserve fund as a bonus to the shareholders, and continued:] The learned judge, after a careful consideration of those facts, comes to the conclusion that the distribution of those shares must be regarded as purely a bonus issued to the shareholders. It is important to note what the judge has found, because when he comes to determine what is the true interpretation of the clause in the will, which I will read in a moment, I doubt very much whether his interpretation differs from that which, for my own part, I think ought to be put upon it. It seems to me that the learned judge differs on the question of fact rather than on the question of law. These shares which I have described were issued as bonus shares, and no doubt they replaced the undistributed profits from which the company was able to distribute the bonus shares as fully paid. The testator says: "I bequeath to my trustees three hundred ordinary shares in the Lancaster Steam Coal Collieries, Ld., upon trust to pay the dividends, bonuses and income thereof to the said Robert Speir of Roebank, Largs, aforesaid and Jane Speir his wife during their lives and during the life of the survivor." What do those words mean, "dividends, bonuses and income"? Are they confined solely to income, or is the use of the word "bonuses" introduced as meaning to include a distribution of capital as bonus? It is said that unless the word "bonuses" is interpreted as including a distribution of capital by way of bonus the words are otiose and no effect is given to them. On the other hand, it is contended that ample meaning can be given if regard be had to the fact which was known to the testatrix—namely, that not only dividends but bonuses had in the past been distributed, and that she may have had the intention expressly to clear up any possible doubt, and not leave the question of what I may call dividend and bonus in doubt, by definitely inserting words which would show that, if there came a distribution of bonuses as well as dividends, those bonuses were to be paid to Robert Speir or his wife, as the case might be. Applying the rule of ejusdem generis, I think the three

words relate to what I will call the income or produce of the shares. It may be that the word "income" might be sufficient by itself, but I think the word "bonuses" was intended by the testatrix to refer to cash bonuses which might be distributed, as had been done before, in addition to dividends, all of which point to something which is in the nature of income, and not of capital; and it is the income or produce of the shares which is given to the tenants for life. If there be a distribution of shares as capital, then it is not within the words of the bequest.

Then comes the question, do we or do we not agree with the learned judge in the finding he has come to—namely, that these shares are to be looked upon as replacing or representative of a cash bonus, and not to be treated as in the nature of a distribution of capital? Upon that, which is a question of fact, although we must apply the law to it, I have come to a different conclusion from that of the learned judge. It seems clear from the statement of Lord Watson in his speech in *Bouch* v. *Sproule* (1) that the right position from which this question ought to be considered is: that it is within the power of the company to capitalize the undivided profits of the company by issuing new shares, and equally within their power to divide the undivided profits which have been accumulating; it is a matter which is within the power of the company to decide; and when we turn to *Inland Revenue Commissioners* v. *Blott* and *Inland Revenue Commissioners* v. *Greenwood* (2), in the speeches of all the three Lords who were in the majority in that case, it is well pointed out that it is the conduct of the company which determines what is the nature of the distribution. Lord Haldane (3) says: "The transaction in the present case was one in which the company was in law dominant on the question whether the money in question was to be capital or income for all purposes." Equally Lord Finlay relied upon and cited the passage I have already referred to from Lord Watson's speech in *Bouch* v. *Sproule*. (4)

(1) 12 App. Cas. 385.
(2) [1921] 2 A. C. 171.
(3) [1921] 2 A. C. 188.
(4) 12 App. Cas. 403.

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And the Lord Chancellor, Lord Cave (1), explains what had been done in that case, as in others, by the company. He says that it is quite true, where there has been a distribution of shares credited as fully paid up, to say that it is a distribution of profits, but he says in the reasons which he gives: "The transaction took nothing out of the company's coffers, and put nothing into the shareholders' pockets; and the only result was that the company, which before the resolution could have distributed the profit by way of dividend or carried it temporarily to reserve, came thenceforth under an obligation to retain it permanently as capital." Applying these tests it seems to me that what was done by the Lancaster Steam Coal Collieries Company was to make a distribution not of what is to be regarded as undivided profits, but a distribution of capital, which it was enabled to do by reason of its possession of undivided profits. On the question of fact these shares must be regarded as capital, and as a distribution of capital, not of income. Therefore, if I am right as to the true meaning of these words "dividends, bonuses and income" they do not cover a distribution of shares which are to be treated as capital. Counsel for the respondent pressed upon us the use of the word "bonuses" as including—I may say necessarily including—something not merely in the nature of a cash bonus but also a capital bonus, because of the fact that the words "dividends" and "income" would be sufficient to cover a cash bonus; but giving that argument its full weight it is to my mind impossible, having regard to the collocation of the words, to assume that the testatrix intended to include the capital distribution, and for these reasons, founded on the cases to which I have referred, it seems to me plain that the right view of the distribution is that it was in the nature of capital. Therefore, the words in the will do not cover it, and these shares do not pass to the tenant for life, and the appeal must be allowed.

WARRINGTON L.J. The question in this case arises between the tenant for life and the remaindermen of the shares in a

(1) [1921] 2 A. C. 200.

certain company, bequeathed by the testatrix's will to her trustees. After the testatrix's death additional shares were issued to the trustees, and the question is whether these additional shares are to be treated as an accretion of capital or are to be held in trust for or transferred to the tenant for life. These additional shares represent what, before their creation, had been, first a general reserve fund, and secondly a fund of accumulated undistributed profits. It is now well settled that it rests with the company to determine whether such resources, if they possess them, should be distributed as income or retained as capital. Each shareholder in the latter case becomes entitled to an addition to his existing shares corresponding in due proportion to the amount so capitalized. It is also settled that in an ordinary case one is entitled, if the company does what has been done in this case, that is to say, capitalized its fund of undistributed profits in new shares representing the due proportion of the amount so capitalized, to regard the new shares as an accretion to the original capital. The question is whether in this will the testatrix, in her trust for the tenants for life, has used expressions which would take the case out of the general rule and give to the tenants for life something which, but for these expressions, would be an accretion of capital. The learned judge has held that the expressions are sufficient for that purpose. With all respect to him, I take the opposite view. The expressions that the testatrix has used are these: After bequeathing the shares to the trustees upon trust, she says "to pay the dividends, bonuses and income thereof" to the tenants for life, and then—I read it shortly but perfectly accurately—"to hold such three hundred ordinary shares upon trust for the Harrogate Infirmary absolutely." She then gives to her trustees power to sell the shares and invest the proceeds of sale, and if they decide to do so, the income of these investments shall be applied in the same manner as the income of the shares. Now, the investment clause is wide enough to authorize the investment of the proceeds of sale of these shares in shares which might quite possibly pay, not a bonus in the

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ordinary sense, but an extra dividend. In fact this company has periodically—and some of these periods have fallen during the time that the testatrix was a shareholder—paid additional dividends of that nature, calling them bonuses, as very many companies do. The testatrix, therefore, knew that some additional income might very well be paid under the name of bonus, and she used, therefore, these words "dividends, bonuses and income." Now, could it possibly be said that these words, used in that collocation, include something which is not income, something under which the shareholder never receives any money at all, although he receives his right to participate in the capital assets of the company. I do not think they do. I think the proper construction of these words is that they all mean the same thing—namely, income; but, as is frequently the case with draftsmen of legal documents, they use several words, whether with the notion of abundant caution or not, I do not know; they use several words where one would do. There could have been no question if the testatrix had said "income"; there could have been no question if she had said "dividends"; but she chose to use these three words, and it seems to me she has only used these three words as expressing the same thing—namely, the income of the shares. And I think that is quite clear, or at any rate it is made more clear by the reference to the income of any new investments being applied in the same manner as the income of the shares to the tenant for life. Accordingly I think the ordinary rule applies and the additional shares must be capitalized and regarded as an accretion to the 300 original shares.

SARGANT L.J. This is a pure question of the construction of the particular phrase in the will, "upon trust to pay the dividends, bonuses and income" of certain shares to the tenant for life. Had the direction merely been to pay the income to the tenants for life, it is admitted that the result of what the company did must have been to capitalize the company's shares and to prevent the tenants for life getting them. But it is argued that the specific mention of

" bonuses " enlarges the gift to them so as to entitle them to retain these bonus shares for themselves as under a special gift to them. I cannot accept this argument. It seems to me that the order of collocation of the words in the phrase " dividends, bonuses and income" indicates that the word " bonuses " connotes rather something inside and within the general word " income " than outside and in addition to it, and this view is to some slight extent supported by the use of the single word " income " in subsequent parts of the will. But, further, not only is the word " bonuses " amply satisfied by being applied to bonuses in the nature of income, but the use of the word " bonuses " was specially appropriate in this particular case, having regard to the previous practice of the company in question. I think, therefore, the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants: *Collyer-Bristow & Co., agents for Titley & Paver-Crow, Harrogate.*

Solicitors for the respondents: *Dinn & Son, for W. R. & R. Gibson, Newcastle-upon-Tyne.*

G. A. S.

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July 12, 13, 16, 17, 18, 19; *Oct.* 25.

[1921. B. 742.]

Foreshore—Accretion—Natural and artificial Causes—Erection of Groynes to prevent Erosion—Accretion where former Boundary ascertainable—Recession of the Line of ordinary High Water.

The general law of accretion applies to a gradual and imperceptible accretion to land abutting upon the foreshore, brought about by the operations of nature, even though it has been unintentionally assisted by, or would not have taken place without, the erection of groynes for the purpose of protecting the shore from erosion.

Smart v. *Magistrates of Dundee* (1797) 8 Bro. P. C. 119 and *Doe* v. *East India Co.* (1856) 10 Moo. P. C. 140 discussed.

Attorney-General v. *Chambers* (1859) 4 De G. & J. 55 and *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool), Ld.* [1915] A. C. 599 applied.

The general law of accretion also applies where the natural accretion, gradual and imperceptible, abuts upon land of which the former boundary was well known and readily ascertainable.

Gifford v. *Lord Yarborough* (1828) 5 Bing. 163 and *Attorney-General* v. *M'Carthy* [1911] 2 I. R. 260 adopted and applied. Dictum of Lord Chelmsford L.C. in *Attorney-General* v. *Chambers* (supra) disapproved as being inconsistent with those decisions.

WITNESS ACTION.

The following statement of facts and of the result of the evidence at the trial is taken from his Lordship's considered judgment:—

"By an indenture dated the 20th of December, 1905, there was conveyed to the plaintiffs, the Brighton and Hove General Gas Company, a piece of land in the parish of Aldrington in the county of Sussex, which was described as being bounded on the north by part of the canal or eastern arm of New Shoreham Harbour and on the south by land belonging to the Crown up to high water mark. The plaintiffs allege in this action that in the month of November, 1920, and subsequently the defendants committed divers acts of trespass upon this piece of land. The acts, which were not in dispute, were committed above the present line of high water mark (by which expression throughout this judgment I mean the high water mark ordinary tide), and therefore, if the present

line of high water mark be the southern boundary of the plaintiffs' land, were undoubtedly trespasses. The defendants, however, contend that having regard to the facts and the law applicable thereto, the southern boundary of the plaintiffs' land is not the present line of high water mark, but is some line situate to the north of the place where the acts were committed, and that they have not therefore trespassed upon any land of the plaintiffs. The defendants, while denying liability, have brought into Court the sum of 50*l.* in satisfaction of the plaintiffs' claim, and this sum the plaintiffs are willing to accept in respect of damages should I come to the conclusion that a trespass has been committed. On this part of the case, therefore, the only question that arises for determination is as to the true position of the southern boundary of the plaintiffs' piece of land.

"But the plaintiffs also complain that the defendants are removing shingle from parts of the shore below the present line of high water mark, and therefore from places admittedly outside the plaintiffs' land, in such quantities as to deprive the plaintiffs' land of its natural protection against the inroads of the sea, and they claim to be entitled to an injunction and damages in respect of this removal of shingle upon the principle of the case of *Attorney-General* v. *Tomline*. (1) The defendants admit that they have removed and intend to continue to remove shingle from what is in any view of the case part of the foreshore. They deny, however, that in so doing any damage whatsoever has been or will in the future be caused to the plaintiffs' land.

"Such being the issues that I have to determine, it is now necessary to state the facts of the case in somewhat greater detail.

"The piece of land conveyed to the plaintiffs on the 20th of December, 1905, forms part of a bank of shingle and boulders running east and west, which separates the eastern arm of New Shoreham Harbour on the north, from the sea on the south. The management, control and protection of New Shoreham Harbour is entrusted to a statutory body known

(1) (1880) 12 Ch. D. 214; 14 Ch. D. 58.

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as the Shoreham Harbour Trustees, and the land in question and the foreshore to the south of it are admittedly within the limits of the harbour as defined by the New Shoreham Harbour Act, 1816. On the lands within these limits the trustees are empowered by s. 27 of the Act 56 Geo. 3, c. clxxxi., to make and effect such works as shall be necessary for improving and preserving the navigation of the harbour and the use thereof by the persons trading thereto. Inasmuch as the erosion by the sea of the bank of shingle and boulders would seriously endanger the eastern arm of the harbour, and if permitted to continue would entirely destroy it, I cannot doubt but that the trustees have ample power to construct such groynes or other works upon the plaintiffs' land and upon the foreshore to the south of it as may be necessary or proper to prevent such erosion. In point of fact, erosion by the sea of this part of the coast, as indeed of the greater part of the coast of Sussex and Kent, is a danger that has to be continually guarded against. This is due to a well known natural phenomenon that is known as the Easterly Drift. Owing to the prevalence of south-westerly and westerly winds in the English Channel, and to the fact that under normal conditions the flood tide sweeps up channel with greater force than that exerted down channel by the ebb tide, there is a more or less constant procession of shingle and sand along the south coast of England from west to east. In some places this shingle gets arrested by natural causes, as at Dungeness, where an enormous amount has accumulated and is still being accumulated. At other places the Easterly Drift appears to have a seriously eroding effect. It would seem, moreover, that the effect of the Drift upon any particular portion of the coast may be different at different periods of time, and that too without the aid of any artificial means. It cannot be doubted that in times gone by shingle was accumulated at Shoreham in such quantities as to cause the sea gradually to recede from Old Shoreham, and to produce that bank of shingle that lies between the eastern arm of Shoreham Harbour and the sea, of which bank, as already stated, the plaintiffs' land forms part. It is clearly

established, however, by the evidence given before me, that at the present time, unless prevented by artificial means, the Easterly Drift would inevitably have an eroding effect upon this bank of shingle. At what date the erosion of the bank began it is probably impossible to ascertain. I have no reliable evidence as to the position of high water mark before the year of the Ordnance Survey of 1898. There seems however reason to suppose that before the year 1870 the sea was gradually and imperceptibly encroaching at this particular part of the coast, one of the defendants' witnesses stating that the encroachment began after the year 1863. To such an extent did this take place that at a date which has not been accurately fixed, but which was not later than 1870, the Shoreham Harbour Trustees caused two groynes to be erected upon the land subsequently conveyed to the plaintiffs and on the foreshore adjoining it. These two groynes are referred to in the various plans used at the trial, and in the evidence of the various witnesses, as groynes Nos. 1 and 2 respectively. The erection of groynes is the usual and natural way of preventing erosion. The shingle swept along by the Easterly Drift is arrested by the groynes and gradually collects on their western side. If the groynes are not high enough or numerous enough, their effect may be to diminish but not entirely check the erosion. If they are higher or more numerous than is absolutely necessary, their effect may be not only to check erosion, but to cause a gradual and imperceptible accretion, and the line of high water mark will gradually and imperceptibly recede. To construct groynes in such a way that the erosion will be checked and no more would pass the wit of man. And yet, if the defendants are right in their submissions of law with which I have to deal later on, this is the task that is imposed upon the owner of land adjoining the sea who wishes to preserve his land from destruction and at the same time keep the sea as his boundary. The erection of the two groynes in question would no doubt have had the effect of diminishing the erosion. But whether the erosion was only diminished or whether for the time being it was held completely in

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check or whether the effect of the groynes was to bring about a temporary gradual accretion to the beach, I am unable on the evidence to determine.

"The only reliable evidence as to the position of high water mark in former days is afforded by the Ordnance Maps of 1898 and 1912, the latter indicating the state of affairs in 1910. A comparison of these two maps shows that by 1910 the high water mark had advanced slightly seaward as compared with the year 1898. On various plans produced in the course of the trial the position of the high water mark in other years—1874, 1880, 1882 and 1906—purports to be shown. But no proof of the accuracy of these positions was forthcoming, nor was there any satisfactory evidence as to how or when they had been ascertained, and I cannot place any reliance upon them. There was also indicated upon the defendants' model and upon certain of their plans a line purporting to indicate the "average high water line 1905 to 1913," and the position of this line was much relied upon by the defendants. It appeared, however, on investigation that this line was taken by the defendants from a plan or sketch that had been made in the year 1920 by a Mr. Gray, one of the employees of the plaintiff company, and merely indicates what was, according to his recollection, the highest point which, between the years in question, had been reached by a spring tide. The line (hereinafter referred to as "Gray's line") does not therefore indicate anything which is of the least assistance in determining the position of the high water mark in any one of those years, or the average position of the high water mark during the period covered by those years. It was, however, clearly established in the evidence given at the trial that by the year 1913 groyne No. 2 had fallen into a very bad state of repair, and had this state of things been allowed to continue, I do not doubt, after hearing the expert evidence on either side, that serious erosion of the beach would have ensued, causing damage to the plaintiffs' land, and eventually endangering the harbour of New Shoreham. In these circumstances the plaintiffs, with the consent and under

the authority and on behalf of the Shoreham Harbour Trustees, undertook the rebuilding of groyne No. 2, and in the year 1913 the rebuilding was effected. In the course of such rebuilding the height of the groyne was raised to the extent of 18 inches. There was some evidence given before me that in the course of carrying out some repairs to groyne No. 1, at a date earlier than 1913, that groyne had also been raised. The evidence as to this was however somewhat vague, and I need not dwell further upon it, inasmuch as, for the purposes of this case, it is sufficient to consider groyne No. 2 alone. The rebuilding and raising of groyne No. 2 had the desired effect of preventing further erosion, and from the year 1913 down to the present time there has been a gradual accretion of shingle and boulders washed up by the sea, with the result that not only was erosion stopped, but there has been a gradual and imperceptible advance southwards of the high water mark. Between groynes Nos. 1 and 2 the high water mark is now to the south of the line of high water mark shown in the Ordnance Map of 1912, though to the east of groyne No. 2 it is still to the north of this line. The present high water mark is of course a considerable distance to the south of Gray's line, and so no doubt was the high water mark in the year 1920, though the exact position of this latter line has not been accurately determined.

"In the latter part of the year 1920 the defendants, claiming to have an interest in the foreshore adjoining the plaintiffs' land, put forward the contention that the southern boundary of the plaintiffs' land was the line of high water mark as it existed in 1913, before the renovation of groyne No. 2, and, being apparently under the mistaken impression that this line was accurately represented by Gray's line, they proceeded to erect certain lines of light railway on the land between Gray's line and the then high water mark. When, in the course of the trial, it became apparent that Gray's line merely represented the line of some abnormally high spring tide, Mr. Manning, on behalf of the defendants, fell back upon the 1910 high water mark shown on the

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Ordnance Map of 1912 as being the true southern boundary of the plaintiffs' land. If the defendants are right upon their submissions of law presently mentioned, this would not be unfair to the plaintiffs, as, according to the evidence of Mr. Rutter, one of the plaintiffs' witnesses, the beach was being rapidly washed away in 1910 owing to the bad state of repair of groyne No. 2. The high water mark of 1913 would therefore have been to the north of that of 1910. I should however mention that the position of the light railways to the east of groyne No. 2 is to the north of the 1910 high water mark, so that if this line is taken as the plaintiffs' boundary on the south, the defendants have trespassed upon the plaintiffs' land to some extent. The erection of the light railways was objected to by the plaintiffs, who claimed that their southern boundary was the high water mark from time to time, and on the 7th February, 1921, the writ in this action was issued. In the meantime the defendants had removed the two top planks of a portion of groyne No. 2 below high water mark, reducing the groyne to its original height. The defendants' reason for doing this was that they considered the raising by the plaintiffs of groyne No. 2 to be a trespass so far as that groyne was on the foreshore. They were not at this time aware of the fact that the plaintiffs in renovating and raising the groyne were acting under the authority and on behalf of the Shoreham Harbour Trustees, who had statutory power to carry out this work, and it was not until towards the end of the trial that Mr. Manning, on behalf of the defendants, abandoned the contention that the raising of the groyne was illegal. But at the time of the issue of the writ and in the defence, although the plaintiffs had restored the removed planks to groyne No. 2, the defendants were maintaining the right to interfere as they pleased with the part of groyne No. 2 that was erected on the foreshore. Indeed, after action brought, they further interfered with a portion of groyne No. 1 on the grounds that it constituted a trespass upon the foreshore."

The defendants were the owners of and were in possession

of the foreshore in the parish of Aldrington, having acquired the same in the year 1909.

The writ in this action was issued on February 7, 1921, and the action was heard on July 12, 13, 16, 17, 18 and 19, 1923.

Jenkins K.C. and *Stuart Moore* for the plaintiffs. The southern boundary of the land conveyed to the plaintiffs in 1905 was the high water mark, and is now the high water mark at ordinary tides, because of the general law as to gradual and imperceptible accretion of land adjoining the foreshore of the sea: Blackstone's Commentaries, ii., 262; *Rex* v. *Lord Yarborough* (1); *Attorney-General* v. *Chambers*. (2) The only question is whether the accretion has been gradual and imperceptible, and there is no evidence to the contrary. It is irrelevant whether the groynes have contributed to the extension of the beach. They are rightfully there, and the Harbour Trustees had ample power to erect them.

The principles applicable to the user of the foreshore are stated in *Attorney-General* v. *Tomline* (3), and the removal of shingle by the defendants threatened the stability of the beach and comes within the principles of that decision.

Manning K.C., *Russell Gilbert* and *Eric Neve* for the defendants. The principles of the law of accretion were stated in *Rex* v. *Lord Yarborough* (1) and *Scratton* v. *Brown* (4), but the general law does not apply to cases where the accretion, although gradual and imperceptible, has been effected, not by natural causes, but by artificial works, such as the groynes in this case: *Smart* v. *Magistrates of Dundee* (5); *Doe* v. *East India Co.* (6); and *Attorney-General of Southern Nigeria* v. *John Holt & Co.* (*Liverpool*), *Ld.* (7), the decision in which case is not consistent with the opinion of Lord Chelmsford expressed upon this question in

(1) (1824) 3 B. & C. 91; affirmed in the House of Lords, 2 Bli. (N. S.) 147; and 5 Bing. 163 (sub nom. *Gifford* v. *Lord Yarborough*).
(2) 4 De G. & J. 55, 67.
(3) 12 Ch. D. 214; 14 Ch. D. 58.
(4) (1825) 4 B. & C. 485.
(5) 8 Bro. P. C. 119.
(6) 10 Moo. P. C. 140.
(7) [1915] A. C. 599.

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Attorney-General v. *Chambers*. (1) The evidence in the present case shows that this accretion was due to the artificial work which was done in 1913, when the groyne was repaired and heightened, and that the recession of the sea was brought about by artificial works on the foreshore itself, which is the defendants' property.

Further, the boundary of the plaintiffs' land on the south was the high water mark, and in 1909 the foreshore was conveyed to the defendants. The Ordnance Survey of 1912 shows the high water mark in 1910 and the line of high water in that year provides the boundary line. Both the plaintiffs and defendants are bound by the state of things existing at that date, and the boundary must be taken as being then well defined and known, so that subsequent accretion would not benefit the plaintiffs. This appeared to be Lord Chelmsford's view in *Attorney-General* v. *Chambers* (2); and in *Hindson* v. *Ashby* (3) Lindley L.J. regarded this question as still undecided. Where the accretion was perceptible by marks and measures it was held not to become the property of the adjacent private owner, but to belong to the Crown: *Attorney-General* v. *Reeve*. (4)

Whether the defendants are endangering the stability of the beach by removing shingle within the principle of *Attorney-General* v. *Tomline* (5) is a question of fact, and we submit that on this point the evidence is in favour of the defendants.

Jenkins K.C. in reply. The view of Lord Chelmsford in *Attorney-General* v. *Chambers* (6) upon which the defendants rely was erroneous, and was criticised and not adopted by the Court of Appeal in Ireland in *Attorney-General* v. *M'Carthy* (7), in which case the Court treated the question as having been concluded by *Gifford* v. *Lord Yarborough*. (8)

(1) 4 De G. & J. 55, 69, 70.
(2) Ibid. 71.
(3) [1896] 2 Ch. 1, 13.
(4) (1885) 1 Times L. R. 675.
(5) 12 Ch. D. 214; 14 Ch. D. 58.
(6) 4 De G. & J. 55, 71.
(7) [1911] 2 I. R. 260.
(8) 5 Bing. 163; S. C. (sub nom. *Rex* v. *Lord Yarborough*) 2 Bli. (N. S.) 147.

The doctrine of accretion therefore applies, and none the less whether it arises from human acts or otherwise, provided those acts are legal. The *Nigeria Case* (1) was a case of artificial reclamation and not merely a case of sea defences as here, and there could not be a clearer statement of the law in our favour than there was in that case. The present is a case of gradual accretion, and the fact that it is due to groynes erected under statutory authority by the Harbour Trustees does not affect the question or the application of the general law.

Cur. adv. vult.

Oct. 25. ROMER J. stated the facts and result of the evidence as above set out and continued: Such being the facts, the plaintiffs contend that inasmuch as the southern boundary of the land conveyed to them by the indenture of December 20, 1905, was the high water mark, their southern boundary at the present time must, in accordance with the general law as to gradual and imperceptible accretion of land adjoining the foreshore of the sea, be the high water mark at the present time. This general law has been stated by Blackstone in these words: "As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma; or by dereliction, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be that if this gain be little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*: and besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King." The reason given by Blackstone for this rule of law is not generally accepted as being the true one. But the rule itself is settled beyond all question by numerous authorities, of which it is sufficient to mention *Rex* v. *Lord Yarborough* (2) and

(1) [1915] A. C. 599. (2) 3 B. & C. 91.

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Attorney-General v. *Chambers* (1), where Lord Chelmsford refers to it as the well known rule of law as to the right of land gained from the sea.

The defendants, however, deny that this general rule has any application to the present case, and base their denial upon two grounds. They say, in the first place, that the accretion to the land, although gradual and imperceptible, has not been brought about by natural causes only, but has been artificially brought about by the action of the plaintiffs in erecting groynes. They also contended at one time that the accretion had been brought about by the action of the plaintiffs in depositing refuse upon their land. This latter contention, however, was unsupported by the evidence given at the trial, and, after the admissions made by Dr. Owens, one of the defendants' witnesses, it was in effect abandoned by the defendants' counsel. The defendants say in the second place that the position of the high water mark as it existed in the year 1910 can be ascertained from the Ordnance Survey of 1912, and that no accretion since that date, however gradual and imperceptible from day to day, and even though brought about by natural causes, can have the effect of advancing the plaintiffs' southern boundary beyond the line indicated on that Ordnance Survey. In other words, they contend that the general law of accretion does not apply where the alteration of the high water mark has been brought about by artificial means, or where it has taken place at any time, however distant, after its position has once been clearly ascertained. I will deal with these contentions in the order in which I have stated them.

The first reported authority in which a distinction was sought to be drawn between gradual and imperceptible accretions brought about by natural causes and those brought about by artificial means is *Doe* v. *East India Co.* (2) There was, it is true, an earlier case relied upon by Mr. Manning as an authority in his favour. That was *Smart* v. *Magistrates of Dundee.* (3) The facts are very

(1) 4 De G & J. 55. (2) 10 Moo. P. C. 140.
(3) 8 Bro. P. C. 119.

obscure, and it is not easy to ascertain what exactly was decided. It is, however, apparent that the point upon which it was cited as an authority was never in issue. The appellant concluded his printed case by the following statement (1): "The appellant purchased a piece of ground in the town of Dundee, bounded by the sea flood, the value of which situation considerably enhanced its price. He then proceeded to embank a part of the sea shore, when he was interrupted by the magistrates, who, in the face of repeated protests, embanked the remainder of the beach, and seized upon that portion of it which had been taken in by the appellant. The point at issue between the parties is shortly this, whether or not a proprietor of land bounded by the sea flood is entitled to any accession to his property from that quarter, that may arise either from the operation of nature or the works of human industry?" It would seem from this that the accretion was not a gradual and imperceptible one, but one brought about suddenly by the erection of an embankment made by the appellant on the foreshore and subsequently added to by the respondents. It is not surprising that the appeal failed. In point of fact the respondents did not contend that there was any distinction between accretion by natural means and accretion by artificial means. In their reasons (2) they stated that they had no occasion to dispute the general doctrine that where a person's property reaches to the sea or to a river, he has a right to the soil that may be acquired from the sea or river by their receding naturally or by his own industry in embanking. To this, however, they added the qualification: "where no other person can show a title to that soil." So qualified, the general rule, whether in relation to natural or to artificial accretion, becomes a mere platitude. Without the qualification, the rule as stated by the appellant and admitted by the respondents is inconsistent with Mr. Manning's submission. I can get no assistance from that case.

I must now examine the case of *Doe* v. *East India Co.* (3)

(1) 8 Bro. P. C. 137. (2) Ibid. 141. (3) 10 Moo. P. C. 140.

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In that case the plaintiffs were entitled to certain land bounded on the west by the river Hooghly, a navigable tidal river. On part of this land, where it adjoined the river, the defendants had constructed a road and an embankment: but this road and embankment, as was subsequently found by the Court, extended beyond the western boundary of the plaintiffs' land and was therefore in part constructed upon the foreshore. Subsequently, by gradual accretion, a strip of land at the foot of the embankment became dry land, and the question to be decided was whether this strip was the property of the plaintiffs or of the defendants. The plaintiffs claimed the strip on the footing that before the accretion took place they were the owners of the land on which the road and embankment had been placed, up to the line of high water mark, and in reliance upon the general rule of law to which I have referred. The defendants resisted this claim on the ground that before the accretion took place the ownership in the soil adjoining the high water mark was in them, and that therefore any accretion to that soil was their property. But they contended also that the accretion was not due to natural causes but was due in whole or in part to human agency. As the Court decided in the defendants' favour on the first ground, the alternative ground did not really arise for decision. But, in delivering the judgment of the Privy Council, Sir William Maule expressed himself as follows (1): "The land claimed has become land by way of gradual accretion. A question of law was raised, whether, supposing the accretion (granting it to be gradual) was one which had been contributed to, or even purposely contributed to, by the acts of the defendants, that would not take the matter out of the ordinary law with respect to the accretion. The Court below thought, and we think rightly, that that made no difference. If there were a gradual accretion, which was not denied, it was one which would be dependent upon ordinary law."

In *Attorney-General* v. *Chambers* (2) the question had

(1) 10 Moo. P. C. 158. (2) 4 De G. & J. 55, 63, 67, 68.

again to be considered. In that case an embankment and other works had been erected upon and adjoining the foreshore of the harbour of Llanelly. The effect of these works was to cause a silting up of parts of the harbour which lay adjacent to them on either side, with the result that portions of the foreshore which were formerly covered by the sea at ordinary high tides had become dry land. The Crown, as owners of the foreshore, claimed to be entitled to this alluvial land so formed by or gained from the sea, on the ground that it had been formed by artificial means, and "had not been added to the adjoining main land by the gradual and imperceptible projection of soil or silt arising from the operation of natural causes." The defendants contended that the right of the Crown did not "extend to or embrace any alluvium, the same being of gradual formation, whether the same shall have been produced by natural or unknown causes, or by cuttings or embankments lawfully made, or other lawful artificial means." Lord Chelmsford was not satisfied with the evidence before him, and therefore, without coming to any final decision upon the questions involved in the action, he directed certain issues to be tried. He did, however, express his opinion upon some of the questions raised in the argument, including the question of law that I have to determine. As to this he observed that there was very little authority to guide him upon the question, which, so far as he could discover, was then raised for the first time. *Doe* v. *East India Co.* (1) had not, however, been cited in argument. Then, after referring to some of the authorities upon the general rule as to accretion, he added: "There is nothing, however, in any of the cases, or in the few text writers upon the subject, which hints at the distinction now sought by the Crown to be established between effects produced by natural and by artificial causes. In order to determine whether there is any ground for this distinction, it is essential to discover, if possible, the principle upon which the right to *maritima crementa* depends." He then cited the passage from Blackstone, to which I have

(1) 10 Moo. P. C. 140.

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already referred, and proceeded as follows: "I am not quite satisfied that the principle *de minimis non curat lex* is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron Alderson in the case of the *Hull and Selby Ry. Co.* (1), namely: 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' And as Lord Abinger said in the same case: 'The principle' as to gradual accretion 'is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore. If this be the true ground of the rule, it seems difficult to understand why similar effects, produced by a party's lawful use of his own land, should be subject to a different law, and still more so if these effects are the result of operations upon neighbouring lands of another proprietor. Whatever may be the nature and character of these operations, they ought not to affect a rule which applies to a result and not to the manner of its production. Of course an exception must always be made of cases where the operations upon the party's own land are not only calculated, but can be shown to have been intended, to produce this gradual acquisition of the sea-shore, however difficult such proof of intention may be. If, then, it had been clearly proved or admitted in this case, that the additions to the sea-shore in the parishes of Llanelly and Pembrey were of gradual and imperceptible progress,

(1) (1839) 5 M. & W. 327.

so as to compel me to express an opinion upon the distinction taken by the Crown between accretions produced by nature and by artificial causes, I should have been prepared to repudiate the distinction, and to refuse any further inquiry to ascertain the original medium line of high water, as I consider this proceeding as closely analogous to a Bill to ascertain boundaries in which it is necessary for the plaintiff to establish, by the admission of the defendant or by evidence, a clear legal title to some land in the possession of the defendant. . . . . But in this case, although the allegation in the information, 'that the alluvial land has not been added to the adjoining main land by the gradual and imperceptible projection of soil and silt upon the seashore arising from the operation of natural causes' is ambiguous and may either amount to a denial of the gradual and imperceptible nature of the accretions or of the cause by which they were produced, yet the witnesses for the Crown say that the alluvial land has not been added to the main land gradually and imperceptibly, but rapidly."

In consequence of this uncertainty as to the facts, one of the issues that he directed to be tried was for the purpose of ascertaining whether the variation in the line of high water had been slow, gradual and imperceptible, or otherwise. I am told that the case was never brought before the Court again, so that the question was never finally decided. But the opinion of Lord Chelmsford is expressed in no uncertain terms, and that opinion is adverse to the contention of the defendants in the present case. It was, however, contended by Mr. Manning that the decision of the Privy Council in *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool), Ld.* (1), is opposed to this opinion of Lord Chelmsford, and to the opinion of Sir William Maule. Both *Attorney-General* v. *Chambers* (2) and *Doe* v. *East India Co.* (3) were cited in argument of that case, but Lord Shaw, in delivering the judgment of their Lordships, did not even refer to, much less did he comment upon, either

(1) [1915] A. C. 599. (2) 4 De G. & J. 55.
(3) 10 Moo. P. C. 140.

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of these opinions, so far at any rate as they dealt with the particular point now in question. It is in these circumstances highly improbable, to say the least of it, that the Privy Council intended to differ from the opinions of those eminent judges, and therefore it becomes necessary to examine the facts and the judgment in that case somewhat closely. The respondents to the appeal or their predecessors in title having obtained grants of land in the Island of Lagos, bounded on one side by the foreshore, had carried out certain works upon their land and also upon the foreshore, including the erection of a retaining wall. They had also from time to time driven stakes into the foreshore to protect their land from erosion. Subsequently to the execution of these works, a strip of shore which had previously been below high water mark had become dry land. The respondents claimed to be the owners of this strip of shore on the ground that it had become dry land by "natural accretion." The Crown, on the other hand, alleged that the change was due to "artificial reclamation." Lord Shaw, in delivering the judgment of the Board, said: (1) "Although various points were brought before their Lordships in the direction of questioning the law of accretion, their Lordships, for the reasons stated, do not doubt its general applicability to lands like those of the respondents abutting on the foreshore. Nor do they, however, doubt the one condition of the operation of the rule. That is that the accretion should be natural, and should be slow and gradual—so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs." Then after referring to several of the authorities which deal with the general law of accretion, he added this (2): "It was strongly contended before the Board that the facts of the case showed it to be substantially one of natural accretion. This argument was this. In accordance with the policy generally approved, stakes were set out between high and low water mark, and the silting up took place within those stakes and between them and the actual shore, and, secondly, any artificial erections were merely for the purpose of levelling

(1) [1915] A. C. 599, 613. (2) [1915] A. C. 615.

the ground so as to make it suitable for the landing of cargoes, and avoiding the erosive action of the sea. The view thus presented certainly does receive no inconsiderable justification from language employed in the judgments of the Court below. More than one reference is made to 'the question of the reclaimed or silted up land,' and no distinction appears to be clearly drawn between the one and the other. Artificial reclamation and natural silting up are, however, extremely different in their legal results; the latter, if gradual and imperceptible in the sense already described, becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore thus suddenly altered by reclamatory work upon it remains as before, that is, in cases like the present, with the Crown. The history of the foreshore adjoining these lands, and of the operations thereon, produces one of the main difficulties of the present case. Their Lordships have come to the conclusion that they are confronted with substantially concurrent judgments of the Courts below upon this question of fact. Upon the appeals Griffith C.J., after referring to the finding of the trial judge, said: 'I have no reasonable doubt that the great bulk of the land between the Crown grant land and the lagoon is the result of artificial reclamation on the part of the defendants and their predecessors.' Osborne C.J., who had been the trial judge, puts his judgment upon this point thus: 'The evidence seems clearly to show that actual reclamation contributed more than alluvion to the extension of the lands in the occupation of the defendants and their predecessors in title, and as to actual gain by alluvion, uninfluenced by the defendants' and their predecessors' reclaiming operations, there is no direct evidence.' The finding is thus not very specific, although Winkfield J. goes the length of saying: 'It is not established that any part of the land neutral tint on the plan' (i.e., the land in question) 'was the result of natural accretion or alluvion.' In this state of the judgment their Lordships are not in a position to hold themselves free to decline to accept the finding.

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Nor do they say that they would have come to a different conclusion. The case accordingly must be dealt with as substantially one of an addition to adjoining lands being caused artificially by the execution of reclamatory work." Now, as I read this judgment, the Privy Council would have been prepared to apply the general law of accretion in favour of the respondents, had they been able to arrive at the conclusion that the silting up was due to stakes and other erections provided by the respondents and their predecessors in title for the mere purpose of preventing erosion by the sea. It was because they were confronted by a concurrent finding of fact in the Courts below that the addition to the respondents' lands had been caused by the execution of "reclamatory works" that they decided in favour of the Crown upon this point. It appears to me, after a careful study of the judgment, that the real distinction that was being drawn by the Privy Council was one between an accretion brought about by works erected for the purpose of reclaiming land from the sea, and a gradual accretion not brought about by works of that nature. I cannot think that the expressions "artificial reclamation," or "reclaiming operations" were intended to apply to a gradual and imperceptible accretion brought about unintentionally by groynes erected for the purpose of protecting the land from erosion. I think that they were intended merely to cover those cases of which Lord Chelmsford had said an exception must always be made, where the operations upon the party's own land are not only calculated, but can be shown to have been intended, to produce a gradual acquisition of the sea shore. In my opinion, a gradual and imperceptible accretion brought about by the operations of nature, is a natural accretion within the meaning of the rule enunciated by Lord Shaw, even though it has been assisted by, or would never have taken place but for, the erection of groynes provided for the purpose of preventing erosion. To hold otherwise would be to deprive both the owners of the land and the owners of the foreshore on the coasts of Sussex and Kent, where groyning is almost universal, of that general convenience and security

which Lord Shaw in an earlier part of the judgment says lie at the root of the entire doctrine of accretion and in which is to be found the very reason of the rule. In my opinion the first reason put forward by the defendants for rejecting the plaintiffs' claim is unsound.

Their second reason is really based upon an observation made by Lord Chelmsford in *Attorney-General* v. *Chambers*. (1) After referring to the fact that the witnesses for the Crown in that case had alleged that the alluvial land had not been added to the mainland gradually and imperceptibly, but rapidly, he says: "Now if by the word 'rapidly' the witnesses mean 'perceptibly,' then the Crown, and not the defendant, would be entitled to these accretions. But if the witnesses merely mean, that at the expiration of some period of time they could perceive the changes which had taken place, although they could not discern them in their progress, then, I think, another important question may arise, and may call for determination, as to whether circumstances may not exist in which, though the changes were gradual, yet the original limits of the Crown's right, and that of the owner of the adjoining land, are now capable of being distinctly ascertained. If there is no clear line of demarcation between the mainland and the seashore by the gradual encroachment or recession of the tide, all trace of the distinction between them will be completely obliterated, and there will be full scope for the rule of alluvion to operate. But suppose that the separation between the mainland and the seashore is distinct; as suppose the landowner puts up a wall to prevent the encroachment of the sea upon him, and the effect of the wall is to produce a gradual and insensible accretion, which cannot be perceived from day to day, but at the end of some long period is distinctly to be seen, ought this to become the property of the landowner? Lord Tenterden, in *Rex* v. *Lord Yarborough* (2) seems to think that it ought, for he says: 'An accretion extremely minute, so minute as to be imperceptible even by known

(1) 4 De G. & J. 55, 69. (2) 3 B. & C. 106.

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antecedent marks or limits at the end of four or five years, may become, by gradual increase, perceptible by such marks or limits at the end of a century, or even of forty or fifty years. For it is to be remembered, that if the limit on one side be land or something growing or placed thereon, as a tree, a house or a bank, the limit on the other side will be the sea, which rises to a height varying almost at every tide, and of which the variations do not depend merely upon the ordinary course of nature at fixed and ascertained periods, but in part also upon the strength and direction of the winds, which are different almost from day to day. And (he adds) considering the word "imperceptible" in this issue as connected with the words "slow and gradual," we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time.' This, however, is not in accordance with the great authority upon this subject, Lord Hale. He says: 'This *jus alluvionis* is *de jure communi*, by the law of England, the king's, viz., if by any marks or measures it can be known what is so gained, for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, *idem est non esse et non apparere*.' Lord Hale here clearly limits the law of gradual accretions to the cases where the boundaries of the sea-shore and adjoining land are so undistinguishable that it is impossible to discover the slow and gradual changes which are from time to time accruing, and when at the end of a long period it is evident that there has been a considerable gain from the shore, yet the exact amount of it, from the want of some mark of the original boundary line, cannot be determined. But where the limits are clear and defined, and the exact space between these limits and the new high-water line can be clearly shown, although from day to day or even from week to week the progress of the accretion is not discernible, why should a rule be applied which is grounded upon a reason which has no existence in the particular case."

But the attention of Lord Chelmsford had not been called

to the fact that the case of *Rex* v. *Lord Yarborough* (1) had been taken to the House of Lords under the name of *Gifford* v. *Lord Yarborough* (2) and had there been affirmed. In that case the land gradually left dry by the action of the sea abutted upon land of which the former boundary was well known and readily ascertainable, for that boundary was a sea wall. It was nevertheless held that the general law of accretion applied. The observations of Lord Tenterden therefore were not merely dicta, but went to the root of his decision, and that decision having been affirmed in the House of Lords, I am, I apprehend, bound by the statement of law enunciated by him, and am not at liberty to give effect to the views expressed by Lord Chelmsford in the passage that I have read, even if those views commended themselves to my mind.

The whole question, however, was most carefully considered by the King's Bench Division in Ireland in the case of *Attorney-General* v. *M'Carthy*. (3) In that case the Court treated the question as having been concluded by the decision of the House of Lords in *Gifford* v. *Lord Yarborough* (2), but Palles C.B. further gave his reasons for considering that, apart altogether from that decision, the dictum of Lord Chelmsford was inconsistent with principle and with authority. With those reasons I respectfully agree.

I come therefore to the conclusion that the southern boundary of the plaintiffs' land is the present high water mark, and I will so declare. The plaintiffs being willing to accept the 50*l.* paid into Court in satisfaction of the damages occasioned by the acts of the defendants which, in the view that I have taken, were trespasses upon the plaintiffs' land, that 50*l.* will be paid out to the plaintiffs, and I will give them liberty to apply for an injunction should that course subsequently become necessary.

It only remains for me to deal with the plaintiffs' claim in respect of the removal by the defendants of shingle and other materials from below the high water mark. As to

(1) 3 B. & C. 91. (sub nom. *Rex* v. *Lord Yarborough*).
(2) 5 Bing. 163; 2 Bli. (N. S.) 147 (3) [1911] 2 I. R. 260.

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this, it will suffice for me to say, after considering all the evidence, that the plaintiffs have in my judgment failed to prove that this removal of material has in any way endangered, or, if permitted to continue to substantially the same extent as at present, is likely to endanger the plaintiffs' land. The plaintiffs' action therefore must fail in so far as it seeks relief under this head.

Solicitors for plaintiffs: *Clarke, Calkin & Son, for Howlett & Clarke, Brighton.*

Solicitors for defendants: *Hicks, Arnold & Bender, for John C. Buckwell, Brighton.*

R. M.

C. A. 1923 EVE J. *Nov.* 15, 16, 19. C. A. 1924 *Jan.* 18, 21.

SCHILLER *v.* PETERSEN AND COMPANY, LIMITED.

[1922. S. 5597.]

Mortgage—Construction—Proviso for Redemption by Debentures in Event of Formation of Company to acquire Property within Six Months of Declaration of Peace—Lunar or Calendar Months in Mortgage Transactions—Context as controlling Meaning—Whether Company with no Business sufficient Compliance with Proviso.

"Month" in law is, prima facie, a lunar month, or twenty-eight days, unless otherwise expressed. But, in mortgage transactions, a month means a calendar month.

The rule so stated in the note in Davidson's Precedents in Conveyancing (2nd ed., 1858), vol. ii., Part II., p. 732, and repeated in subsequent editions, approved.

By a mortgage dated March 9, 1917, the defendants, as mortgagors, conveyed certain lands in Cornwall containing about 500 acres, with the mines and minerals thereunder, to the plaintiff as mortgagee to secure 5000*l.* and interest at 6 per cent. The mortgage contained a provision that if interest were paid on every half-yearly day on which it was payable until March 9, 1923, or within "28 days" after each such day, the mortgagee would not call it in, "provided also that in case a company shall be formed with limited liability within six months of the declaration of peace, and which company shall acquire the said premises," then the mortgagee would accept first mortgage debentures of the said company for the 5000*l.* to be in full satisfaction and discharge of the principal moneys secured by the mortgage. No interest on the mortgage had been paid since March, 1922. Within six calendar months of the Declaration of Peace, but some days after the expiration of six lunar months,

a company with limited liability was formed by the defendants with a memorandum and articles duly registered and a capital of 10,000*l.*, divided into 100,000 shares of 2*s.* each, and the defendants agreed to sell to the new company the premises comprised in the mortgage of March 9, 1917. Some three and a-half years before the formation of this company the premises and mines comprised in the mortgage had been entirely abandoned, certain of the plant and machinery sold, and the shafts filled up. Only 10*l.* 12*s.* of the capital of the company had been paid up, and there was no ostensible business to be carried on. The plaintiff claimed judgment for 5000*l.*, an account, and, in default of payment, foreclosure. The defence was that there had been a compliance with the proviso in both respects:—

Held (reversing the decision of Eve J.), that the transaction being one of mortgage was excepted from the rule at common law that "month" prima facie meant lunar month, and further, apart from its being an exception to the rule, there was sufficient context in the mortgage deed to show that the six months referred to in the proviso for redemption meant six calendar months:—

Held, therefore, that the company was incorporated within the time limited by the proviso.

Hutton v. *Brown* (1881) 45 L. T. 343; 29 W. R. 928 approved.

Bruner v. *Moore* [1904] 1 Ch. 305 discussed.

Held, also, that the company so incorporated fulfilled the conditions required of it, notwithstanding that it was not at the date when the debentures were offered to the plaintiff a going concern.

WITNESS ACTION.

By an indenture of mortgage dated March 9, 1917, made between the defendants (thereinafter called the mortgagor) and the plaintiff Frederick Nassau Schiller (thereinafter called the mortgagee), after reciting that the mortgagor was seised in fee simple in possession free from incumbrances of the hereditaments thereinafter described, and that the mortgagee had agreed to lend the mortgagor 5000*l.*, it was witnessed that in consideration of 5000*l.* paid to the mortgagor by the mortgagee, the mortgagor covenanted to pay the mortgagee on September 9 then next the 5000*l.* with interest at 6 per cent., and also so long after that day as any principal money remained due thereunder to pay interest after the rate aforesaid by equal half-yearly payments on March 9 and September 9 in every year. By the same indenture the mortgagor conveyed all those lands and premises situate in the parish of Altarnun in the county of Cornwall called by the names and containing the quantities

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therein set out and containing in all about 500 acres, and all buildings erected thereon and all mines and minerals in or under the same unto and to the use of the mortgagee in fee simple, subject to a proviso for redemption thereof on payment of 5000*l.* and interest on September 9 then next.

The said mortgage contained a proviso that if the mortgagor should on every half-yearly day on which the interest was made payable under the security until March 9, 1923, "or within 28 days" after each of such days respectively, pay interest on the principal sum for the time being owing, then the mortgagee should not call in the sum of 5000*l.* before March 9, 1923; and there was a further proviso that it should be lawful for the mortgagor to pay off the said sum of 5000*l.* with interest at any time without giving the statutory notice of his intention so to do, "Provided also that in case a company shall be formed with limited liability within six months of the Declaration of Peace, and which company shall acquire the said premises, then and in such case the mortgagee will, at the request of the mortgagor or his successors in title, accept first mortgage debentures of the said company for the sum of 5000*l.* (such debentures to comprise the whole issue and to be a first charge by way of floating security on the undertaking of the company), and to be in full satisfaction and discharge of the principal moneys hereinbefore mentioned, and will, on the receipt of the said debentures, forthwith reconvey the said premises to the mortgagor, or his successors in title, or as he or they shall direct." The defendants had not paid the half-yearly interest under the mortgage since March, 1922.

The plaintiff alleged in his statement of claim that no company with limited liability had been formed within six months of the Declaration of Peace which had acquired the premises comprised in the mortgage, and the event mentioned in the last-stated proviso of the mortgage had not happened; and the whole of the 5000*l.* secured by the mortgage was now due and owing to the plaintiff. The plaintiff claimed judgment for that sum and interest from March 9, 1922, an account of what was due, and in

default of payment of what was found due foreclosure of all right and equity of redemption in the mortgaged premises.

By their statement of defence the defendants admitted the mortgage and stated that the premises comprised therein were assured to them by the plaintiff in consideration of 8000*l.* They pleaded a memorandum under seal of the defendants dated March 8, 1917, which was accepted by the plaintiff, by which the defendants agreed that the consideration of the conveyance should be 3000*l.* payable in cash, and 5000*l.* to be a first charge on the property bearing interest at 6 per cent. ; also that the defendants should undertake to form a company within six months of the Declaration of Peace, and give the plaintiff 6500 out of a total capital of 100,000 shares.

Further, that when the company was formed the defendants were to have the right to convert the mortgage for 5000*l.* into first mortgage debentures of the company for the same amount, such debentures to comprise the whole issue and to be a first charge by way of floating security on the undertaking of the company.

The conveyance, memorandum and mortgage were all executed in the City of London.

The defendants also pleaded, as was the fact, that a company with limited liability was formed and registered by the defendants on February 20, 1922, under the Companies Acts by the name of Altarnun Mines, Ld., with a capital of 10,000*l.* divided into 100,000 shares of 2*s.* each, in pursuance of the memorandum of March 8, 1917, and that by an agreement dated February 23, 1922, the defendants as vendors agreed to sell and the new company agreed to purchase the premises comprised in the indentures of conveyance and mortgage in consideration of 9000*l.*, to be satisfied by the allotment to the defendants or their nominees of first-mortgage debentures for 5000*l.* (to comprise the whole issue and to be a first charge by way of floating security on the undertaking of the new company, carrying interest at 6 per cent.) and of 40,000 shares of the new company of

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2*s.* each, to be credited for all purposes as fully paid up. The defence further alleged that the plaintiff had refused to concur with the defendants in executing the conveyance and release of the said premises to the new company, or to accept the debentures of the new company in satisfaction and discharge of the principal moneys secured by the mortgage, notwithstanding that a proper indenture of conveyance and release already sealed by the defendants and the new company was forwarded to him for execution on February 28, 1922, and notwithstanding that the 5000*l.* debentures and 6500 fully-paid shares in the new company were duly allotted to him by the new company on the nomination of the defendants. The defendants counterclaimed for a declaration that the plaintiff was bound to accept the 5000*l.* debentures of the new company in full satisfaction of the principal moneys secured by the mortgage and to execute the conveyance and release; an order that he do forthwith execute the same; and damages for breach of this obligation.

The reply of the plaintiff and defence to the counterclaim was that the new company was not formed to carry out any business or undertaking, and that for more than two years preceding its formation the premises comprised in the mortgage and the mines and work previously carried on there had been entirely abandoned and left derelict, and that the only object of forming the company was to avoid the legal obligation of the defendants under the mortgage; and, further, that if the company had been formed within the time limited by the proviso (which it had not) the company was never possessed of any "undertaking" upon which it could give a charge by way of floating security.

The value of the mortgaged premises lay in the mineral deposits, and there was evidence that the defendants had expended 30,000*l.* in developing the mines.

The action came on for hearing before Eve J. on Nov. 15, 1923.

Gover K.C. and *A. L. Ellis* for the plaintiff. This being in effect a foreclosure action by a mortgagee against the

mortgagor the plaintiff is entitled to the order asked unless the defendants can establish (1.) that the new company was formed according to the proviso in the mortgage within six calendar months after the Declaration of Peace, and that can only be so if the months were calendar months, and (2.) that the company which was in fact formed was a company within the meaning of the proviso, that is, a company formed to carry on some business, and not a still-born company with insufficient assets and no business. The burden of proof is on the defendants to show compliance with the proviso.

Clayton K.C. and *Cecil Turner* for the defendants, the mortgagors. We have performed the conditions in the proviso. The question is whether the company was formed within the time specified and whether a "month" is to be deemed a calendar month in this mortgage or a lunar month, and also whether time was of the essence of the contract. If month means lunar month we were five days late in forming the company, if calendar month it was done within the time.

First, the company was regularly incorporated under the Companies Acts with a memorandum, articles of association, and directors, and with a capital of 10,000*l.* It is a company within *Salomon* v. *Salomon & Co.* (1)

Secondly, month means calendar month in a mortgage transaction, although, prima facie, at law it means a lunar month. The text-books are clear on this point: Davidson's Precedents in Conveyancing, 2nd ed., vol. ii., Part II., p. 732; 3rd ed., vol. ii., Part II., p. 862; 4th ed., vol. ii., Part II., p. 309. That statement has been adopted in Coote on Mortgages, 8th ed., vol. ii., p. 922, and in Seton's Judgments and Orders, 7th ed., vol. iii., p. 1870. In *Hutton* v. *Brown* (2) there is a recognition of the rule that in mortgages a month is to be deemed a calendar month, but in that case it was held to be a lunar month, because it was not a mortgage transaction. The context is also considered in all these cases, as the word cannot have two different meanings in the same deed: *Lang* v.

(1) [1897] A. C. 22. (2) 29 W. R. 928.

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Gale (1); *Helsham-Jones* v. *Hennen & Co.* (2), where there was a mercantile transaction in the City of London. In *Reg.* v. *Inhabitants of Chawton* (3) months were held to be calendar months, as the context showed that it was so intended. In *Bruner* v. *Moore* (4) Farwell J. held that months meant lunar months, but that was an action for specific performance of a contract and not a case of a mortgage transaction, and the word "months" was construed according to the primary meaning. In all criminal matters month means calendar month, and in mercantile transactions in the City of London. The cases referred to by Davidson in support of the proposition he lays down are: *Anon.* (5); *Dyke* v. *Sweeting.* (6)

Here there is a context in the mortgage deed of March 9, 1917, which helps the construction we contend for. There is a mention of "28 days" where it would have been proper to call it a month if lunar month had been contemplated; and there is a reference to equal half-yearly payments and the "statutory period." But apart from this, and assuming the word means a lunar month, we rely on the terms of the memorandum of March 8, 1917, which was not displaced by the mortgage deed next day to be executed as a collateral agreement, and time was not there treated as of the essence of the contract.

[They also referred to *Smith* v. *Smith* (7) and *Kemp* v. *Derrett.* (8)]

Gover K.C. and *A. L. Ellis* for the plaintiff. On the first point. Although a company with limited liability was in fact formed to acquire the mortgaged premises, its capital was wholly inadequate to reopen these derelict mines. It was not such a company as was contemplated or intended by the parties in the proviso. It was formed with the sole object of avoiding their liability by the defendants, and not to carry on a business for gain: *Smith* v. *Anderson.* (9) In the present case, on the evidence of Sir William Petersen,

(1) (1813) 1 M. & S. 111.
(2) (1914) 112 L. T. 281.
(3) (1841) 1 Q. B. 247.
(4) [1904] 1 Ch. 305.
(5) (1740) Barn. Ch. 324.
(6) (1745) Willes, 585.
(7) [1891] 3 Ch. 550.
(8) (1814) 3 Camp. 510.
(9) (1880) 15 Ch. D. 247.

the managing director of the new company, they had no business to carry on, no assets but 10*l.* 12*s.* and a barren moor. Some three and a half years before this all the plant and machinery had been removed and sold. The first mortgage debentures were to be a floating charge upon the "undertaking," and there was none; the substratum of the company was gone.

On the second point, as to the meaning of "month," the cases referred to by Mr. Davidson do not really support the statement that there is a general rule that in all transactions arising out of mortgages "month" means calendar month. There must be some context to take the case out of the general rule at law, which is that month is prima facie a lunar month. It may mean calendar month, no doubt: Lord Halsbury's Laws of England, vol. xxi., p. 226*n.*, where *Hutton* v. *Brown* (1) is referred to; Bythewood and Jarman's Conveyancing, 4th ed., vol. iii., p. 884; and Norton on Deeds, p. 157, where he says that the time allowed for redemption in a foreclosure decree is to be calculated according to calendar and not lunar months. It depends upon the context. *Bruner* v. *Moore* (2) does not help the defendants, but is an authority in our favour: Stroud's Judicial Dictionary, 2nd ed., vol. ii., p. 1223.

This proviso in the mortgage is collateral to the mortgage, it is an optional right given to the borrower, and by performing a certain condition to put an end to his personal liability by way of accord and satisfaction: it must be construed strictly. The memorandum was preliminary to the mortgage and was superseded by it and cannot be looked at: *Leggott* v. *Barrett* (3); *Millbourn* v. *Lyons* (4); *Franco* v. *Alvares* (5); *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (6) On the question of time being of the essence of the contract, we rely on *Ford* v. *Earl of Chesterfield* (7); *Thompson* v. *Hudson* (8); Fry on Specific Performance, 6th ed., sect. 1082.

(1) 29 W. R. 928.
(2) [1904] 1 Ch. 305.
(3) (1880) 15 Ch. D. 306.
(4) [1914] 2 Ch. 231.
(5) (1746) 3 Atk. 342, 346.
(6) [1897] A. C. 81, 86.
(7) (1854) 19 Beav. 428.
(8) (1869) L. R. 4 H. L. 1, 14.

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Clayton K.C. in reply. The obligation to form the company continued after the expiration of the six months: *Palmer* v. *Johnson.* (1)

EVE J. By this action the plaintiff as mortgagee seeks to enforce his security by foreclosure and to recover from the defendants under their covenant in the mortgage deed the principal sum of 5000*l.* with interest thereon at 6 per cent. from March 9, 1922. The mortgage deed is dated March 9, 1917, the mortgaged premises are some 500 acres of freehold land at Altarnun in Cornwall with the mines and minerals of whatsoever description lying thereunder, and there is contained in the deed this proviso. [His Lordship read the last proviso in the mortgage deed and stated the two contentions raised in the pleadings.] These two contentions cover the issues raised in the action and counterclaim and have provoked an interesting discussion, not the less so because each side has had to insist upon a construction of the proviso productive of results which neither party to the contract can be credited with having contemplated. In order to make my meaning clear it is necessary that I should state a few facts, none of which are in dispute. Before the transaction out of which this litigation arose the plaintiff, the owner in fee of the mortgaged premises, had given to certain individuals, one of whom was called before me, a licence to enter thereon and to prospect and search for minerals, and an option, if such investigation proved hopeful, to take up a lease. The licence and option having been acquired by the defendants for the substantial sum of 10,000*l.*, they proceeded to purchase the fee from the plaintiff for 8000*l.*, of which 3000*l.* was paid in cash and the balance of 5000*l.* was secured by the mortgage to which this action relates. Had the prospectors merely taken the lease of the premises the plaintiff would have reserved to himself a considerable portion of any profit which might be gained from the working of the mine, but the effect of the purchase by the defendants of the fee was, of course, to merge that interest, and the vendor ceased to

(1) (1884) 13 Q. B. D. 351.

have any continuing interest in the property except as unpaid vendor.

The purchase was completed and the mortgage executed in March, 1917, and for some sixteen or eighteen months thereafter mining operations were energetically continued, and extended, but at the end of that period the impossibility of working the minerals at a profit was realized, the mine was shut down, the plant and machinery were withdrawn from the mine, sold and removed, the shafts were either filled in or covered over and fenced in, and the place was abandoned and left derelict. I have heard the evidence of the chief partner in the defendant company, and he has informed me that the net cost of the venture to the defendants, including interest on the 5000*l.* already paid, amounted to no less a sum than 30,000*l.* The date fixed as that on which peace should be treated to have been declared for contractual and other purposes was August 31, 1921, and on February 20, 1922, the defendants formed and incorporated with limited liability the company I have already referred to: the Altarnun Mines, Ld. A conveyance of the mortgaged property to the company and purporting to be made between the plaintiff of the first part, the defendants of the second part, and the company of the third part was prepared, engrossed, and stamped, and on February 27 executed by the defendants and the company, but the plaintiff refused to execute the same, alleging, as he still alleges, that the company was not such an one as was contemplated by the parties in the proviso contained in the mortgage deed, and that its formation and subsequent purchase of the property had not brought the proviso into operation. This contention necessitates an examination into the construction of the proviso and an inquiry whether the company does in fact fulfil the condition which has to be complied with in order to make the proviso operative.

Before turning to the actual language of the deed it must be noted that the only real value of the mortgaged premises lay in the supposed and in part proved mineral deposits, that experimental working had been proceeding for some

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months, and that a position had been reached in which the defendants had evidenced their opinion as to the ultimate prospects of the mine by expending in cash the large sums of 10,000*l.* in acquiring the options, and 3000*l.* towards the purchase of the fee, besides covenanting by the mortgage to pay the further sum of 5000*l.* for the latter. But except in so far as it affected the value of his security the plaintiff had no further pecuniary interest in the success of the venture. It was not a case where the owner of the minerals was reserving as part of the price a percentage or royalty on the minerals brought to bank. In this condition of things,, that is to say, with a sale out and out, the plaintiff was accepting for the major part of his purchase money a security of a very speculative character. If the venture turned out well the security would probably be sufficient, but if it failed each party must have realized that it would be to the mortgagor's covenant that the mortgagee would have to look for the liquidation of the greater part of the debt. It was in these circumstances that the deed was executed containing the proviso to which I have sufficiently referred to obviate the necessity of reading it again. First, what was the effect of that proviso if it came into operation? It was this: to vary in a very substantial degree, and to the prejudice of the vendor, the nature of his security, and to some extent the value of the covenant. Under the deed he was legal mortgagee of the whole property. If he accepted, as he would have had to do had the proviso become effective, the debentures of the proposed company, the legal mortgage would have been replaced by an equitable charge, and an equitable charge of a nature which subjects it to this grave disadvantage, that it would be open to the company at any time to create a specific mortgage or specific mortgages over the property charged in priority to the charge of the debenture holder and to his prejudice. A floating charge connotes the right of the company in the absence of stipulations to the contrary to create specific charges taking priority over the floating security. There was also the substitution of the limited company as covenantors for the defendants. I do not overlook the fact that the

mortgagors are themselves a limited company, but it is a company whose covenant the vendor was willing to accept in substitution for that of its principal shareholder—a circumstance which is strong evidence of its ability to pay under the covenant, whereas the company formed to take over these mines would be acquiring a property subject to a heavy mortgage, would be embarking on a speculative business, would have to give liberal terms if it wanted to raise money on second mortgage, and would have to hold out attractive possibilities to shareholders, a condition of things the cumulative effect of which must be to lessen the value of its covenant. These incidents lead one to the question: What was the consideration moving from the mortgagors for these very substantial concessions on the part of the mortgagee? That is to be found in the collateral agreement dated the day before the mortgage deed, but part of one contemporaneous transaction. By that agreement—and this is the only purpose for which, in my opinion, it is legitimate to refer to that collateral agreement—the mortgagors agreed that if the company should in fact be formed within the period specified the mortgagee should be given 6500 shares out of a total capital of 100,000 shares. This was the inducement held out to the mortgagee as consideration for the substantial concessions on his part, and in addition to the debentures he was to receive an allotment of 6500 shares, the result of which would be to give him some interest in the future prosperity of the company. That was the position and these were the relevant circumstances in 1917. It is not possible for me to treat the collateral memorandum, which, after all, is in large measure a mere statement of the views of the parties as to their mutual obligations, as affecting in any way the construction of this proviso. I have therefore to ask myself this question: does this company give effect to the contract between the parties? Let me preface my answer by saying that if I use the word "device," or any other word capable of an offensive construction, I do not use it in that sense at all. Nothing that has been done or attempted in this case calls for adverse comment, but it is not disputed that the

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formation of this company was a device to escape further liability on the part of the defendants. When the company was formed the mine and the whole property had been abandoned and left derelict for a period of three and a half years, and the condition of such plant or buildings as had been left on the property when the sale of the movable plant and machinery had taken place, had not improved in the interim. The value of the land is placed at a figure very far short of 5000*l.* Some of the shafts have been filled up, others have fallen in. The whole mine would have to be reopened and unwatered if any workings were contemplated, and when it is realized that over 30,000*l.* has been expended on it beyond what has been received from the sale of the minerals extracted, it is almost incredible that a time will ever come when this mine can be reopened and worked, or when the land will acquire any other value than that which it bears as more or less waste land in an exposed position, for the most part unfenced and clothed with very scanty herbage. In these circumstances the company was formed with a capital of 10,000*l.* divided into 100,000 shares of 2*s.* each. The first complaint is that the capital is inadequate, that the division into 2*s.* shares is something nobody contemplated, and that the allotment to the plaintiff of 6500 of such shares is no compliance with the contemporaneous memorandum. I put all that aside; for one thing I do not think it is material, and for another the plaintiff never stipulated that the shares should be of any particular nominal amount. He was content if he got $\frac{65}{100}$ or $\frac{13}{20}$ of the capital, and as an allotment of 6500 shares out of the 100,000 shares of 2*s.* each would give him this proportion, that seems to me to be an answer to this part of his complaint. It is true that a company with a nominal capital of 10,000*l.* divided into shares of small denomination hardly looks like a company possessed of resources sufficient to unwater and start this mine again; but I cannot find that the plaintiff ever insisted that the proposed company should have any particular capitalization. The real complaint is that, as the company has not been formed with any intent to carry on any business, or to

earn any profit—and the evidence of those responsible for its formation is relied upon to support these statements—it is not really a company within the meaning of the proviso. I do not think I can give effect to that argument. The company is in fact incorporated, it has for its objects aims and purposes the pursuit of which might result in profit, and the fact that there is no present intention of carrying on business or attempting any of the objects for which the company has been ostensibly created cannot render nugatory the incorporation and registration, though it may be that failure to commence business may ultimately afford grounds for putting an end to the company. I think I am bound to treat the company as an existing entity, and its history since its incorporation is shortly this. Within seven days it executed a conveyance by which it purported to acquire this property for 9000*l.*, satisfied as to 5000*l.* by debentures to be issued to the plaintiff, and as to the residue by the allotment of 40,000 shares, 6500 to the plaintiff and 33,500 to the defendants. Upon the execution of the conveyance five debentures of 1000*l.* each were issued in the name of the plaintiff, whereby the company covenanted to pay him on March 9, 1923, the sum of 5000*l.* with interest at 6 per cent. in the meantime, and charged with such payments the undertaking and all its properties present and future. A few shares other than those allotted as consideration for the purchase have been allotted, and the paid-up capital amounts to 10*l.* 12*s.* There is no uncalled capital.

I come back to the question: Does a company so constituted give effect to the contract between the parties? Did either of the contracting parties, who clearly contemplated that if this venture was a success the mortgagee should thereafter be satisfied with a lesser security in consideration of his being allowed to participate in the subsequent prosperity of the company to be formed to carry on the undertaking, at the same time contemplate and intend that if on the contrary the operations of the mortgagors were so utterly unsuccessful that nothing remained for the company to acquire but these 500 acres of useless moorland, the mortgagee could still be

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required to surrender his rights as legal mortgagee and as covenantee in exchange for the debentures and shares of a corporation with a paid-up capital of 10*l.* 12*s.* and wholly unable to pay one penny of the debt and interest due to him? I cannot believe that anything so absurd was intended by the parties, and I cannot therefore hold that the formation of this company and the offer to the plaintiff of the debentures and shares it has purported to issue and allot in his name is a compliance with the condition embodied in the proviso.

It may be that when this adventure was entered upon nobody was willing to face the obvious alternative of its not being a success. Possibly it was that the experimental workings which had proceeded for some months, coupled with what I gather was a very encouraging report by a competent man, blinded the parties to the possibility of that which has in fact happened, and that if the parties had been more alive to the possibility of failure the proviso would have been so worded as to make that clear which I agree cannot be said to be without some doubt. But having regard to the relevant circumstances subsisting at the respective dates, circumstances which I am not only entitled but bound to take into account, I cannot bring myself to hold that this which has been done is a successful expedient for freeing the defendants from their liability under the covenant, and, therefore, as a matter of construction I think the proviso has not been complied with, and that the defence founded on the allegation that it has been complied with fails.

Questions of construction, however, are matters upon which opinions occasionally differ, and inasmuch as this litigation involves a very substantial sum, it is perhaps desirable that I should express my opinion upon the other point which has been argued, which is this: whether, assuming that the formation of this company was a sufficient compliance with the proviso, the company was incorporated within the time specified in the proviso, or, in other words, does the expression "within 6 months of the Declaration of Peace" mean calendar or lunar months? For this purpose, again, I do not think

I am entitled to pay any regard to the memorandum, I must construe the deed as it stands. It is conceded that prima facie the expressions "a month" or "months" in legal documents mean lunar months. That is certainly not the popular view, and it is at least doubtful whether any but the well informed would ever be alive to the possibility of the words being open to two constructions, for when one speaks colloquially of months, one naturally means calendar months. In law however it is undoubtedly well settled that the prima facie meaning of the word "month" is a lunar month, and it lies upon those who assert that the prima facie meaning is to be departed from in any particular case to establish by some context, or by some usage, or by contract between the parties, that the secondary meaning of a calendar month is to be adopted.

The defendants, in support of their contention, that calendar and not lunar months are referred to in this deed, rely first upon the nature of this transaction, and secondly upon the context in which the expression is found. This, they say, is a mortgage transaction, and there is an established rule that in mortgage transactions the word "month" is to be read as meaning a calendar, and not a lunar month.

The first question is whether there is such an established rule, and to assist me in solving that question recourse has been had to all available authorities on the point. They begin with a statement in a very early edition of Davidson's Conveyancing. The earliest produced in Court is the second, published in 1858, and at p. 732 of vol. ii., Part II., there is this note: "A month in law is, prima facie, a lunar month, or twenty-eight days, unless otherwise expressed. But, in mortgage transactions, a month means a calendar month. It has been so decided in the case of a foreclosure, and was so considered (though under the circumstances it was not necessary to decide the point) upon a covenant in a mortgage to pay the money at the end of six months, and having regard to the long-established practice of fixing the time for redemption with reference to the period of a year (formerly at the end of one year, and now in general of half a year),

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it is probable that the same rule would be applied to any other computation of time relating to mortgages."

That statement has been adopted by the authors of many well-known text-books, some of which have gone through many editions published at intervals since the year 1858; but in order to see to what limit the rule had been carried at the date when the statement was first made, one must resort to the authorities cited in support of it, and in determining whether it ought to be extended, as the learned editor suggests, one must consider subsequent decisions in which the note has been cited in support of an argument that in mortgage transactions generally a particular rule of construction applies. In the first of the two authorities cited by Mr. Davidson it had been held that in a foreclosure decree the six months allowed to the mortgagor were to be calendar months, and in the second the Court had expressed an opinion, but had not in fact decided, that a covenant to pay at the end of six months ought to be construed as meaning calendar months. It is true that the note contains the statement that "in mortgage transactions a month means a calendar month," but when the whole note is read carefully I think this statement must be read as confined to the actual contract of mortgage, and that the question whether the same rule extends to matters not directly connected with that contract is left open. No authority beyond the two mentioned by Davidson is cited in any text-book which has reproduced the substance of his note. Reliance has naturally been placed on the language employed by Fry J. in *Hutton* v. *Brown* (1), which seems to recognize the existence of the rule in mortgage transactions; but it is to be noted that the learned judge only referred to the rule for the purpose of saying that it had no application to the case with which he was dealing, and that he was directing his attention to those parts of the mortgage transaction in which the expressions "12 months" and "6 months" are used to denote periods of one year and half a year. Where these conditions exist the words must of necessity be construed as meaning calendar

(1) 29 W. R. 928.

months, and as in many cases of mortgages these conditions do exist and one must of necessity construe the same words in the same way wherever used in the instrument, this undoubtedly results that in a mortgage deed it is generally far easier to find a context rebutting the primary meaning of the word "month" than it is in other instruments. But I do not feel justified in adopting the view that there is any general rule by which mortgage transactions are put upon a different footing from other instruments in this connection. I am supported in this attitude by the exhaustive judgment of Farwell J. in *Bruner* v. *Moore* (1), where that learned judge in considering whether there is any general exception making the word "month" mean calendar month in commercial documents and deciding that there is no such general exception, says (2): "It is, therefore, a question of construction in each case, to which the ordinary rules of construction apply, namely, that words must bear their ordinary primary meaning unless the context of the instrument read as a whole, or surrounding contemporaneous circumstances, show that the secondary meaning expresses the real intention of the parties, or unless the words are used in connection with some place, trade, or the like, in which they have acquired the secondary meaning as their customary meaning quoad hoc." I might add, though it is not very material, because reliance was not, in fact, placed upon it, that I do not think the statement in Stroud's Judicial Dictionary, 2nd ed., vol. ii., p. 1223, that the word is treated as meaning calendar month in calculating time for the performance of conditions, is quite accurate. The authority cited for that statement is *Franco* v. *Alvares*. (3) On examining the report of that case it will be found that it was not so held because the performance of a condition was involved, but because the condition was one affecting a legacy, a matter in which the Ecclesiastical Courts had original jurisdiction; and inasmuch as in the Ecclesiastical Courts the word "month" was always treated as meaning a calendar month, Lord Hardwicke, in

(1) [1904] 1 Ch. 305. (2) [1904] 1 Ch. 310.
(3) 3 Atk. 342, 346.

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exercising a concurrent jurisdiction with the Ecclesiastical Courts, held there would be no uniformity in proceedings if he did not adopt the sam econstruction.

It comes, therefore, in my opinion, to this: is there any context in this deed which warrants me in attaching to the expression "six months" the meaning of six calendar months in preference to the primary meaning of six lunar months? I do not suppose either of these contracting parties thought anything about lunar months; and although, as Farwell J. points out in the case I have just referred to, statements by either party as to the sense in which he used or intended to use the words are not admissible for the purpose of construing the document, I approach the consideration of this deed with a desire, if possible, to give effect to what I think was in the minds of the parties.

It is material in the first place to note that throughout the deed there is no place in which the word "month" is so used as to raise a presumption that the secondary meaning must be attached to it. In consideration of the advance the mortgagor covenants to pay to the mortgagee on September 9 next the sum of 5000*l.*, and "also so long after that day as any principal money remains due under these presents to pay to him interest thereon after the rate aforesaid by equal half-yearly payments"—not even six-monthly payments, or anything of that sort. Then follow the conveyance of the mortgaged premises, a covenant to keep the buildings insured, and this proviso: "Provided always and it is hereby agreed that if the mortgagor or his successors in title shall on every half-yearly day on which the interest is made payable under this security until the 9th day of March, 1913, or within 28 days after each of such days respectively pay" —the mortgage money is not to be called in.

Reliance has been placed on the expression "within 28 days." That, it is said, is a lunar month; and if the parties were thinking of lunar months, why did not they say "one month" instead of "28 days"? The answer perhaps is that they were not thinking of lunar months, but whether this be so or not, I cannot treat the reference to twenty-eight

days as a context in any way helping to control the prima facie meaning of the words I have to construe. The next clause is a proviso whereby it is "further agreed and declared that it shall be lawful for the mortgagor or its successors in title to pay off the said sum of 5000*l.* with interest at the rate aforesaid calculated to the date of such payment at any time without giving the statutory notice of its intention so to do." The reference to the "statutory notice" is not quite accurate, but it has been asked, what does that mean? and the answer suggested is that means without giving three months' notice of the intention, and those three months must be three calendar months. Therefore, it is said, you find herein a context wherein "three months" must be construed as meaning calendar months. I cannot follow that. If I were to write out the proviso substituting for the words "statutory notice" the notice which is obviously in the mind of the draftsman I should have to insert the word "calendar" before the word "month," as that is the meaning attached to the word in Acts of Parliament. That, therefore, does not assist one way or the other.

Then we come to the only part of the deed where the word "months" is used; and I find it impossible, in the absence of any general exception affecting mortgage transactions, to hold there is any context in this deed, read as a whole, controlling the primary meaning of the word.

In these circumstances, even if I had come to the conclusion that the formation of this company was a compliance with the proviso, I should have been constrained to hold that the company was not formed within the time limited. On both grounds the defence fails and, in my opinion, the plaintiff is entitled to relief substantially in the form which is claimed by the statement of claim. G. M.

C. A.

The defendants appealed. The appeal was heard on January 18 and 21, 1924.

Clayton K.C. and *Cecil Turner* for the appellants.

Gover K.C. and *A. L. Ellis* for the respondents.

The arguments were substantially the same as those used in the Court below.

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POLLOCK M.R. This is an appeal from a decision of Eve J., who gave judgment for the plaintiff in the action upon his claim to recover 5000*l.* from the defendants under an indenture of mortgage dated March 9, 1917, whereby the defendants as mortgagor agreed to pay that sum to the plaintiff. The question is whether the defence set up by the defendants has been made good. The learned judge came to the conclusion that the defendants had not established their defence to the action, and that therefore they were liable to pay the 5000*l.* to the plaintiff.

Two points have been raised by the defence. In the mortgage of March 9, 1917, there was the following proviso. [His Lordship read the proviso and continued:] On that proviso the defendants say that they are not now liable to pay the 5000*l.* to the plaintiff, because a company has been formed which did acquire the premises in accordance with the proviso, and therefore that the plaintiff, the mortgagee, was bound to accept the first mortgage debentures in the company so formed for 5000*l.*, which the company was prepared to give him, but that he had refused to accept them. The plaintiff however said that the so-called company was not a genuine company, but was formed solely with the view of evading payment of the 5000*l.* due under the mortgage and compelling the plaintiff under the proviso to accept debentures in lieu of his money, and that the offer to him of such debentures was not a good offer, first, because the company, even if it was a company which complied with the terms of the proviso, was not formed within six months of the Declaration of Peace, and, secondly, because it was in fact not a company within the terms of the proviso.

First, was there a company with limited liability formed by the mortgagors within six months of the Declaration of Peace? Every one is agreed that by the Treaty of Peace Act, 1919, and the Order in Council dated August 10, 1921, made thereunder, the date of the Declaration of Peace was August 31, 1921. In order to ascertain whether the company was formed within six months of the Declaration of Peace it is necessary

to decide the meaning of the word " months " as used in the proviso. The date of the incorporation of the company was February 20, 1922, and that date would be too late if " months " are to be calculated at twenty-eight days, and it is said that the word " months " in the proviso meant periods of twenty-eight days and no more, and that, consequently, this company was incorporated outside the limit of six months from the Declaration of Peace. It is therefore necessary to determine whether " months " as used in the proviso were intended to be periods of twenty-eight days, or calendar months.

I have looked carefully at the authorities, which go back as far as 1745, on the meaning of the word " month." In *Dyke* v. *Sweeting* (1) it is said that the Court thought (though there was no judgment given upon the point) that " months " were to be calendar months. That case is important as showing that it was permissible to look at the indenture in which the word " months " occurred in order to determine whether the context would show what was intended to be the meaning of " months," whether calendar months or lunar. At common law the word " month " means a lunar month, but there were exceptions to that common law meaning in the case of mercantile transactions in the City of London and in its use in the Ecclesiastical Courts, and, as shown by *Dyke* v. *Sweeting* (1), already referred to, where it can be collected from the context of the deed in which the word occurs that " month " was intended to mean a calendar month.

In *Anon.* (2), where an order for foreclosure had been made, Lord Hardwicke held that the word " months " meant calendar months and not lunar months. With regard to mortgage transactions the matter appears to be not uncertain. There was as long ago as the first edition of Davidson's Precedents in Conveyancing a note in them which stated that a month was in law prima facie a lunar month, but in mortgage transactions it denoted a calendar month. That note is to be found in the fourth edition published in 1881

(1) Willes, 585. (2) Barn. Ch. 324; 2 Eq. Ca. Abr. 605.

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(vol. ii., Part II., p. 309), and seems to have descended from other editions of earlier date founded on the accepted practice with judicial authority to support it. The cases relied upon by Mr. Davidson seem to me to justify the statement.

With regard to judicial authority, in *Hutton* v. *Brown* (1), before Fry J., it was said in the course of the argument for the defendant: "This is a mortgage transaction, and in a mortgage, 'months' means 'calendar months'"; and that was treated as a proposition of certainty. Fry J. said (1): "Then it is said that in mortgage transactions months are always calendar months, and that this is a mortgage transaction. But the rule as to mortgages only arises from this, that the interest on mortgage money is a fixed yearly sum, and therefore half a year's interest is for six calendar months. I cannot expand this into a mortgage transaction." There, though he does not apply the rule he in no way dissents from it.

Farwell J. in *Bruner* v. *Moore* (2) said that although in Ecclesiastical Courts "month" meant calendar month, it was well settled that at common law "months" denoted lunar months, and to make an alteration it had been necessary to have recourse to statute, and he then gave instances in which such alterations had been made. He mentioned the exception which existed with regard to mercantile transactions, and in cases where the context showed that calendar month was intended, and for that he cited: *Lang* v. *Gale* (3); *Reg.* v. *Inhabitants of Chawton.* (4) He also gave another category, where the surrounding circumstances showed that the parties did not intend to use the word in its primary or strict sense, but with some secondary meaning. It is to be observed that *Hutton* v. *Brown* (5) was cited to Farwell J. from the report in the Weekly Reporter. He does not make, and it was not necessary for him to make, any particular reference to mortgages, and it is curious if he were minded to dispute the rule that he never made any such reference. It seems to me, therefore, that he was not

(1) 45 L. T. 343.
(2) [1904] 1 Ch. 305, 309.
(3) 1 M. & S. 111.
(4) 1 Q. B. 247.
(5) 45 L. T. 343; 29 W. R. 928.

inclined to dissociate himself from the rule that "month" in mortgage transactions means a calendar month, which is founded on the authority of *Hutton* v. *Brown* (1) and on text-books.

Having regard to those authorities I think there is a rule whereby in mortgage transactions the word "month" is to be taken to mean calendar month. Having come to that conclusion it will be sufficient for the determination of the meaning of "month" in this case, as I cannot read this transaction as anything but a mortgage transaction. But the context also in this mortgage deed shows that "months" in the proviso was intended to mean calendar month, as, having regard to the time at which the interest is to be paid, it is remarkable that when reference is made to a period of twenty-eight days, instead of referring to that as "a month" it is in fact set out in words as "28 days," and the contradistinction thus brought out between "month" used as meaning calendar month and a term of twenty-eight days justifies the meaning of calendar month being assigned to the word "months" in this proviso. So much on the first point. In my opinion Eve J. was wrong in holding that this company was formed outside the time limit.

On the second point, it is necessary to observe in the first place that Eve J. said that there had been nothing in the formation of the company which was deserving of adverse comment or in the conduct of either of the parties, and therefore we must regard this case as one in which no sinister motive can be attributed to either side. Eve J. also said that opinions on such a matter might differ. I differ from him with reluctance. The parties having carried out in form the terms of the proviso without having adopted any device the company must be one formed in accordance with the proviso. There were no precautions laid down in the proviso as to the amount of the shares to be issued nor any provision for working capital. Eve J. said, and Mr. Ellis for the respondent before us contended, that in view of what had happened it was curious if such a company as this should be a sufficient

(1) 45 L. T. 343; 29 W. R. 928.

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compliance with the proviso, but we must look at the proviso, and not at what may be the result of any decision we may come to, to see whether the proviso has been honestly complied with. I think that this company which the defendants formed was one which complies with the terms of the proviso. This appeal must be allowed with costs.

WARRINGTON L.J. I am of the same opinion. The mortgage deed with which we are concerned in this case is in the ordinary form, but contains a special proviso in the following terms: [His Lordship read the proviso and continued:] The defendants say that the company there referred to has been formed and has issued first mortgage debentures for 5000*l.*, which were, in accordance with the terms of the proviso, the total issue of first mortgage debentures, and are a first charge on the undertaking of the company, and that therefore the plaintiff is bound to accept those debentures in full satisfaction of the 5000*l.* lent by him on the security of the mortgage and to reconvey the premises to the company. These debentures have been offered to the plaintiff, but he has refused to accept them.

Two questions on that arise. No doubt the company was formed and has acquired the property, the subject of the mortgage, and an issue of 5000*l.* first mortgage debentures has also been created which is there ready for the plaintiff to take up. The questions to be decided are first whether the company, though formed and fulfilling the conditions laid down in the proviso, is in reality such a company as is contemplated by the proviso in the mortgage; and, secondly, whether, having regard to the fact that the company was incorporated more than six lunar months after the declaration of peace, it was formed in due time.

As to the first point, it has been said that any company formed under the proviso must be a company which was intended to be a going concern, but in my judgment there is nothing in the proviso to support that contention. The company has 500 acres in Cornwall and minerals thereunder.

Between the date of the mortgage and the termination of the war the mortgagor did attempt to turn the mines to advantage, and spent a considerable sum of money for that purpose, which however he has lost. But the mortgage contained no provision for the carrying on of any mining business by the mortgagor, therefore at the end of six months the property might have been in exactly the same position as at the date of the mortgage, with no attempt having been made to exploit the mines.

There is nothing in the proviso to show that it was necessary for the company to be engaged in a going business, but the only condition was that it should acquire this land, and that it has done.

Then it is said that the company was not formed in due time, but the defendants in their defence allege that the "six months" mentioned in the proviso means six calendar months, and that therefore the company was in fact formed in good time. In my opinion there is authority for the proposition that in regard to mortgage transactions there exists a rule, excluding the ordinary rule of common law, to the effect that "months" means calendar months. That proposition is stated in a note to Davidson's Precedents in Conveyancing as early as the second edition, and also before that in a note by Mr. Davidson in Martin's Conveyancing; at any rate, the rule was accepted as early as 1858, and has been treated as a rule from that time until the present. That rule in Davidson's Precedents in Conveyancing is set out almost verbatim in Coote on Mortgages, and no doubt is thrown upon its existence in any text-book. It was referred to and relied upon in the argument in *Hutton* v. *Brown* (1), and Fry J. in his judgment threw no doubt upon its existence; and before Farwell J. in *Bruner* v. *Moore* (2) the rule was also referred to as an existing rule by counsel for the plaintiff in his reply. Therefore I think it is fair to say that this being a mortgage deed, and this proviso being in the nature of a special proviso for redemption, it must be held that the expression "months" is used in a mortgage transaction.

(1) 29 W. R. 928. (2) [1904] 1 Ch. 305.

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Further the common law meaning will give way to the more popular meaning wherever the context will allow. In my opinion there is ample context in this mortgage for that purpose, for wherever a period of time is there referred to it is to calendar months, as in the covenant to pay the principal moneys. The covenant is to pay on September 9, being six calendar months after the execution of the deed, and interest is made payable half-yearly on September 9 and March 9 in every year, that is, every six calendar months. The only place in which anything but a period which is to be ascertained by reference to calendar months occurs is where the reference is to twenty-eight days. I think, therefore, that it is impossible to avoid the conclusion that in the proviso, as well as in the rest of the deed, the parties were reckoning in calendar and not in lunar months. I will just mention *Erith Engineering Co.* v. *Sanford Riley Stoker Co.* (1), in which the Court of Appeal came to the conclusion, in a case which was not unlike the present, that the word "months" there meant calendar months. That case is an authority for the proposition that the Court may, where a sufficient context exists, hold that the common law meaning of the word "month" is displaced. Therefore the judgment of Eve J. ought to be reversed and this appeal allowed.

SARGANT L.J. I am of the same opinion. The questions here are whether the company was formed in due time, and whether it was such a company as to comply with the terms of the proviso. The ordinary rule of common law that "month" means a lunar month has well recognized exceptions in the case of mercantile instruments, in ecclesiastical law, and where interpreted otherwise by statute; also in the case of domestic service in questions as to the length of notice required. I think that the authorities referred to by the Master of the Rolls and Warrington L.J. lead to the conclusion that a further exception exists, and has for many years been accepted as existing, in the case of mortgage transactions, in which, as in the case of the other exceptions

(1) (1920) 37 R. P. C. 217.

I have mentioned, the word "months" means calendar months. Further, whatever the prima facie meaning of "month" may be, the word is a very flexible one, and a slight context is sufficient to alter its meaning. If in a document the unit of time is a year, that would tend to show that calendar month was intended. That is well illustrated in *Hutton* v. *Brown* (1), where Fry J. came to the conclusion that the word "month" was there used to denote lunar month, because the main transaction in that case was one providing for the making of weekly payments.

Applying that principle to the present case I think that the references to months in the mortgage deed, both in the proviso and in the other parts of it, are to calendar months. Indeed in the one instance where a period equal to a lunar month is provided for, it is specifically referred to as a period of twenty-eight days. And in the recent case of *Erith Engineering Co.* v. *Sanford Riley and Stoker Co.* (2), which was not the case of a mortgage, the Court of Appeal came to the conclusion on a slighter context than here that the six months there referred to meant six calendar months.

In the Law of Property Act, 1922 (12 & 13 Geo. 5, c. 16), which comes into operation on January 1, 1925, "month" is defined by s. 107 as meaning calendar month. That definition affords some indication of the recognition of the gradual change that has been taking place in the meaning of the word "month."

On the second point, I think it is reasonably clear that the company which has been formed satisfies the precise terms of the proviso.

Appeal allowed.

Solicitors for appellants: *Maxwell & Co.*

Solicitors for respondent: *May, Chiver, May & Deacon.*

(1) 45 L. T. 343; 29 W. R. 928.

(2) 37 R. P. C. 217.

W. I. C.

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DEUCHAR *v.* GAS LIGHT AND COKE COMPANY.

[1922. D. 1498.]

Gas—Statutory Company—Statutory Powers—Express Power to convert and manufacture Residuals—Express Power to "provide" (inter alia) "materials"—Outside non-residual chemical necessary—Implied Power to manufacture amount required in lieu of buying.

A statutory gas company were empowered (*a*) to make and supply gas, (*b*) to convert, manufacture and sell residuals arising from gas-making or from the materials used therein, and (*c*) to make and sell all articles so produced.

They were also empowered (*d*) to make and maintain gasworks, machinery, and apparatus, (*e*) to manufacture refuse and products obtained from gas-making, and (*f*) to "provide" such apparatus and "materials" and do all such things as they deemed requisite for those purposes.

In order to convert their residual naphthalene into beta-naphthol (the proper method of using it) they required an outside chemical reagent—namely, caustic soda—which is neither a residual nor a product thereof:—

Held, that, as no particular method of "providing" the "materials" required for converting their residuals was prescribed or prohibited, the defendants were impliedly authorized to manufacture the necessary amount of caustic soda for themselves, and were not bound to purchase it from the chemical manufacturers.

Ashbury Railway Carriage and Iron Co. v. *Riche* (1875) L. R. 7 H. L. 653; *Baroness Wenlock* v. *River Dee Co.* (1885) 10 App. Cas. 354, 362; *Attorney-General* v. *Great Eastern Ry. Co.* (1880) 5 App. Cas. 473, 478, 481; *Small* v. *Smith* (1884) 10 App. Cas. 119, 129; and *Lyde* v. *Eastern Bengal Ry. Co.* (1866) 36 Beav. 10, 16 applied.

Attorney-General v. *London County Council* [1902] A. C. 165 and *Attorney-General* v. *Mersey Ry. Co.* [1907] A. C. 415 distinguished.

WITNESS ACTION.

The plaintiff was a holder of some of the defendants' preference stock. He was also the secretary of a chemical company associated with many others in a chemical combine.

The defendants were incorporated by a Royal Charter of April 30, 1812, but at the present time their powers were regulated by private Acts of 1868 and onwards.

The 1868 Act (31 & 32 Vict. c. cvi.) provides as follows:—

Sect. 40 provides that the company "may make and store and supply gas, and may convert, manufacture, and deal with, sell, and dispose of coke, tar, coal, pitch, asphaltum,

ammoniacal liquor, oil, and all other products, refuse, or residuum arising, remaining, produced by, or obtained from the making by them of gas, or the materials used therein, and may make and sell all articles produced from or by means of those several matters . . . . and generally may carry on all business from time to time usually carried on by gas companies.

Provided always, that the arrangements adopted by the company for the production of gas and coke, and for the utilisation of the waste products of gas manufacture, shall embrace the most approved method in use at similar works from time to time established, and the company shall prevent the unnecessary discharge of smoke and the escape of noxious vapours and gases into the atmosphere.

Provided also, that nothing in this Act contained shall prevent the company from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of the manufacture or sale of any articles, matters, and things producible from the residual products arising from the manufacture of gas."

Sect. 43 provides that the company upon the gas lands may continue, make, maintain, alter and discontinue gas-works, buildings, ... machinery, and apparatus and may make and store gas, and may "manufacture" coke and "other refuse and products remaining or obtained from making gas," and from "materials used in or produced by the making of gas," and may construct, erect, maintain, and "provide" such works, buildings, machinery, apparatus, and "materials," and do all such things as they deem requisite for those purposes. . . . .

The 1876 Act (39 & 40 Vict. c. ccxxv.) provides as follows:—

Sect. 5 provides that on certain lands therein specified, the company "may erect and maintain and use works for the manufacture and storage of gas, and for the manufacture, conversion, and storage of residual products."

Sect. 64 provides that the company may purchase, construct, maintain, and use all such appliances connected

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with the manufacture of gas, and "all such works for the manufacture or distillation of the products and residuals arising from or out of the manufacture of gas," upon the lands described in the Schedule "as they may require or deem necessary or expedient for efficiently and economically carrying on their undertaking."

The 1903 Act (3 Edw. 7, c. xli.) provides as follows :—

Sect. 13 provides that the company may use the lands therein referred to for making maintaining altering or discontinuing or for continuing to make or maintain thereon gasworks, buildings . . . . machinery and apparatus and may thereon make and store gas and make coke and "manufacture and deal with products refuse and residuals remaining or obtained from making gas or coke and from materials used in or produced by the making of gas or coke or manufacturing or dealing with the said products refuse or residuals" and may construct erect maintain and "provide" on the said lands such works buildings machinery apparatus and "materials" as the company deem requisite for the aforesaid purposes or any of them.

One of the ordinary residuals arising from making gas is naphthalene, and the ordinary commercial method of dealing with it is to convert it into Beta-naphthol by the electrolytic process. This requires the use of caustic soda as a reagent. Caustic soda is neither a gas residual nor a product thereof, and for many years the defendants had bought it in the chemical market, and used this process, without any objection.

Recently however the defendants had come to the conclusion that they could carry on their undertaking more efficiently and economically if they bought the raw materials and made their own caustic soda. They therefore erected on the permitted lands a factory and plant of a capacity just sufficient to make the caustic soda required for converting their naphthalene.

A necessary by-product resulting from the making of caustic soda is chlorine. This is a dangerous product, which has to be got rid of under the Alkali, &c., Works Regulation Act, 1906 (6 Edw. 7, c. 14), and the defendants in fact

used it for making bleaching powder out of non-residuals and selling the same.

On July 6, 1922, the plaintiff commenced this action for a declaration that the manufacture of caustic soda and chlorine was ultra vires and for an injunction.

The defendants relied on their statutory powers, and besides pointing out that the chlorine was only a by-product of the caustic soda they made, alleged in the alternative that the chlorine actually made was no more than was required for the conversion and manufacture of residuals—e.g., ammonia, benzene, toluene, cyanogen liquor and carbolic acid—so that its manufacture, even if intentional, was strictly within their powers.

The fact that they actually used the chlorine for making and selling bleaching powder out of non-residuals was not raised in the pleadings.

Maugham K.C., *Hunter Gray K.C.*, *Dighton Pollock* and *H. L. Murphy* for the plaintiff. The defendants are a statutory company and must justify under their statutory powers. Those powers must either be expressly conferred or derived by reasonable implication from the statutory provisions: Buckley on Companies, 9th ed., p. 11 [10th ed., p. 13]; *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1); *Baroness Wenlock* v. *River Dee Co.* (2); *Attorney-General* v. *Great Eastern Ry. Co.* (3), explained by Lord Macnaghten in *Amalgamated Society of Railway Servants* v. *Osborne* (4); *Attorney-General* v. *London County Council* (5); *Attorney-General* v. *Mersey Ry. Co.* (6)

Under their 1868 Act, s. 40, the defendants may do three things: (*a*) They may make and supply gas. (*b*) They may convert manufacture and sell residuals arising from gas-making or the materials used therein. (*c*) They may make and sell all articles so produced.

(1) L. R. 7 H. L. 653.
(2) 10 App. Cas. 354, 362.
(3) 5 App. Cas. 473, 478, 481.
(4) [1910] A. C. 87, 97.
(5) [1902] A. C. 165, 167, 169.
(6) [1907] 1 Ch. 81, 104–106; [1907] A. C. 415, 416, 418, 419.

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Now caustic soda is not used in gas-making, nor is it a residual or a product of a residual. What right then have the defendants to make it? The second proviso shows that the section is confined to the manufacture and sale of articles producible from the residual products of gas manufacture.

Sect. 43 no doubt authorizes the defendants to "manufacture" residuals, etc., and to "provide" materials and "do all such things as they deem requisite for those purposes." The final words would of course cover anything, but they must be read ejusdem generis: *Stephens* v. *Mysore Reefs (Kangundy) Mining Co.* (1) The word "provide" does not authorize "manufacture."

The 1876 Act carries the matter no further. The present works are not for the manufacture or distillation of residuals. They are for the manufacture of an outside non-residual chemical. On the present point the 1903 Act, s. 13, is no wider than the 1868 Act, s. 43.

The defendants' contention really is that because they are entitled to manufacture gas and residuals and provide materials necessary for those purposes, therefore they are entitled to manufacture any outside non-residual bodies required for those purposes. Pushed to its logical conclusion this involves the proposition that if they require coal, water, gasometers, or rubber gloves they can set up a coal mine, waterworks, steel foundry, and rubber manufactory.

This is quite a novel conception of a gas company's powers, and there is nothing in the statutes to warrant it.

Sir John Simon K.C., *Sir Arthur Colefax K.C.*, *Wilfrid Greene K.C.* and *Andrewes-Uthwatt* for the defendants. The defendants are admittedly entitled to convert their residual naphthalene into Beta-naphthol by using the outside non-residual caustic soda as a reagent, and to buy caustic soda for that purpose. Why should they not manufacture a sufficient quantity for that purpose only—i.e., not for sale? Chlorine no doubt results from the manufacture of caustic soda, and being a noxious or offensive gas has to be got rid of under the Alkali, &c., Works Regulation Act, 1906

(1) [1902] 1 Ch. 745, 749.

(6 Edw. 7, c. 14). The best way is to use it for bleaching powder, though the defendants could use it for their residuals. The use however to which the chlorine is put is not the subject of complaint in the pleadings. It is only the manufacture of caustic soda and chlorine that is objected to.

Now the test to be applied in order to ascertain whether the manufacture of caustic soda is within the defendants' powers is not one of absolute necessity. If it were, the defendants would fail, as it can obviously be bought—at a price! Nor is the test one of mere convenience. If it were, the defendants would obviously succeed.

The true test is whether the manufacture is reasonably incidental to the statutory purposes. One of those statutory purposes is the conversion and manufacture of residuals. Their 1868 Act, s. 43, authorizes the defendants (inter alia) to "provide" materials and "do all such things as they deem requisite for those purposes." No particular method of providing is expressly prescribed or prohibited, and so long as they are bona fide seeking to carry out their statutory duties they may adopt any method not expressly prohibited: *In re Peruvian Rys. Co.* (1); *Baroness Wenlock* v. *River Dee Co.* (2)

If limited to their own use they might even work a private coal mine: *Lyde* v. *Eastern Bengal Ry. Co.* (3), cited by Vaughan Williams L.J. in *Attorney-General* v. *North Eastern Ry. Co.* (4)

Things incidental to the main statutory purpose are authorized unless expressly prohibited: *Attorney-General* v. *Great Eastern Ry.* (5); *Baroness Wenlock* v. *River Dee Co.* (6); *Small* v. *Smith.* (7) Secus, if merely convenient and not so incidental, as in the omnibus cases: *Attorney-General* v. *London County Council* (8); *Attorney-General* v. *Mersey Ry. Co.* (9)

Hunter Gray K.C. in reply. The defendants say that

(1) (1867) L. R. 2 Ch. 617, 624.
(2) (1883) 36 Ch. D. 675*n*, 677*a*.
(3) 36 Beav. 10, 16.
(4) [1906] 2 Ch. 675, 679.
(5) 5 App. Cas. 473, 478, 481.
(6) 10 App. Cas. 354, 362.
(7) 10 App. Cas. 119, 129.
(8) [1901] 1 Ch. 781, 804, 805; [1902] A. C. 165, 167, 169.
(9) [1907] A. C. 415, 416, 418, 419.

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they only make enough caustic soda for their own requirements. That is irrelevant, unless its manufacture is so incidental to their business that it is within their powers: *Attorney-General* v. *London County Council.* (1)

The limitation of their manufacture is really illusory, as they can obviously make more gas than they want in order to increase their output of residuals. Compare the illusory undertaking in *Attorney-General* v. *Mersey Ry. Co.* (2)

Under *Small* v. *Smith* (3) the use of caustic soda is no doubt authorized as incidental to the main purpose of converting residuals. But its manufacture is not incidental to that main purpose, and if the defendants want to manufacture it they must obtain a new Act.

ASTBURY J. [after stating the preliminary facts]. The defendants are admittedly entitled to make Beta-naphthol under their statutory powers. They are admittedly entitled to use caustic soda as a reagent for this purpose, and they are admittedly entitled to buy the amount required. The question is whether they are entitled to manufacture the amount of caustic soda so required.

The case turns entirely upon the true construction of the defendants' statutes. Many authorities have been cited, but the law is accurately stated in Buckley on Companies, 9th ed. p. 11, 10th ed. p. 13, where, after referring to corporations created by charter, the learned author says: "But a corporation created by statute stands in a wholly different position. The statute does not create a corporation at common law. It creates a statutory creature, which cannot go beyond its statute for the reason that to the statute it owes its whole existence. A statutory corporation created by Act of Parliament for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined by that Act. 'The objects which the corporation may legitimately pursue must be ascertained from the Act itself,' and 'the powers which the corporation may lawfully use in furtherance of these

(1) [1902] A. C. 165, 167, 169.
(2) [1907] 1 Ch. 81, 106; [1907] A. C. 415, 416.
(3) 10 App. Cas. 109, 129.

objects must either be expressly conferred, or derived by reasonable implication from its provisions.' "

That proposition of law is not disputed by either side. It is only in the application of the principle there enunciated that the difference arises. It may well be, as stated by Vaughan Williams L.J. in *Attorney-General* v. *Mersey Ry. Co.* (1), that: "You ought to give a wider construction to the words of a memorandum of association creating and defining the powers of a purely commercial company having no compulsory powers and no monopoly than you would give to the words of a statute creating a company, like the railway company, having compulsory powers of land purchase and a practical monopoly." I deal with this case on the footing that that addition should be made to the passage in Buckley that I have just read.

Before I deal with the defendants' statutes I will refer shortly to the pleadings for the purpose of seeing what is the real and only issue in this action. [His Lordship then read the pleadings and continued:] No evidence has been given by or on behalf of the plaintiff that the defendants have manufactured or propose to manufacture more caustic soda than is necessary for the converting of their naphthalene into Beta-naphthol, nor that they have manufactured more chlorine in the process of making the caustic soda than can be used up in treating other residuals of their gas-making, and it is stated, and I think it is obviously the fact, that no sale of caustic soda or chlorine has been made by or is contemplated by the defendants. In other words, the manufacture objected to is solely for the purpose of converting the naphthalene produced by their gas plant into Beta-naphthol, which conversion they are plainly entitled to make.

The first statute referred to was the Gas Light and Coke Company's Act, 1868. Sect. 40 is in these words: [His Lordship read the section down to the first proviso and continued:] Now I stop there for a moment. There is an express power here given to convert any gas product—e.g., naphthalene—and to sell it. There is also a power used in

(1) [1907] 1 Ch. 81, 106.

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conjunction with the word "convert" to "manufacture" the residuals. The defendants forcibly contend that the word "manufacture" in this collocation must be given a fairly wide construction, because it is obvious that the power is not given merely to manufacture the residual by making gas, but to do something to the residual when obtained. The word "manufacture" probably means, I should imagine from the context of this and other sections, "working up or using for the purpose of manufacture," but whether I am right about that or not is immaterial, because it is perfectly plain that there is express power to convert naphthalene into Beta-naphthol. Then s. 40 proceeds: [His Lordship read the first proviso and continued:] Now it is not contested that one approved, if not the most approved method of converting naphthalene into Beta-naphthol is by using caustic soda as the reagent. Then the section continues: [His Lordship then read the second proviso and continued:] The plaintiff contends that the manufacture of caustic soda is a separate industry; that there is no power given in this or any other statute enabling the defendants to make it, and that, therefore, they are thrown back upon the market to purchase what they require. He also contends, but I think without justification, that if the defendants are allowed to make caustic soda they are freed from being indictable for a nuisance for its manufacture, because it is not the "manufacture or sale of any article matter or thing producible from the residual products arising from the manufacture of gas." The true meaning is this. Assuming that the defendants are entitled to convert naphthalene into Beta-naphthol by means of caustic soda, and assuming, which is a point I shall have to decide, that it is convenient and beneficial in their interests that they should make, as distinguished from purchase, the amount of caustic soda required for that purpose, that manufacture of caustic soda would be incident to the conversion of naphthalene into Beta-naphthol, and if anything went wrong by way of nuisance, they would, in my judgment, be liable under this proviso, notwithstanding the plaintiff's argument to the contrary.

Sect. 43 of this Act is, if anything, still wider. It is in these words: [His Lordship read the section and continued:] In other words, they may make Beta-naphthol, from naphthalene, they may make it with caustic soda, and they may provide caustic soda, if they deem it requisite to do so, for that express purpose.

There is another statute, the Gas Light and Coke Company's Act, 1876, which in s. 5 says: [His Lordship read the section and continued:] In my opinion a building put up for the conversion of naphthalene into Beta-naphthol, which provided for and enabled the defendants for that purpose to manufacture the necessary quantity of caustic soda, would be within the express powers of this section.

Sect. 64 of the same Act says: [His Lordship read the section and continued:] If the defendants, as they apparently do, deem it necessary or expedient in the carrying on of their business to convert naphthalene into Beta-naphthol by means of caustic soda made by them for this purpose, I fail to see why they are not entitled, under these statutes, to do it.

The last Act which appears to be relevant is the Gas Light and Coke Company's Act, 1903. [His Lordship read s. 13 and continued:] That again seems to me to give similar powers.

In support of his contention that the defendants are not entitled to make their own caustic soda as distinct from buying it the plaintiff relies upon a number of well-known authorities, commencing with *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (1) He also relies on various passages in *Baroness Wenlock* v. *River Dee Co.* (2) I need only refer to the passage where Lord Watson says: "Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of

(1) L. R. 7 H. L. 653. (2) 10 App. Cas. 354, 362.

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these objects must either be expressly conferred or derived by reasonable implication from its provisions."

The plaintiff says that it is not one of the defendants' purposes to manufacture caustic soda. I agree. But one of their objects is to convert their residuals, including naphthalene, and the proper means of converting it is by means of caustic soda. As they are expressly authorized to make that conversion, I cannot understand how it can be said that there is any implication that they must purchase their caustic soda rather than make the amount necessary for the conversion, and I see nothing in the *Wenlock Case* (1) contrary to their contention.

The plaintiff next referred to *Attorney-General* v. *Great Eastern Ry. Co.* (2) The headnote commences with a principle not particularly helpful to him. It says: "The doctrine of ultra vires as explained in *The Ashbury Ry. Co.* v. *Riche* (3) is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the Legislature has authorized by an Act of Parliament, ought not (unless expressly prohibited) to be held as ultra vires."

Lord Selborne says: "I agree with James L.J. that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

I cannot understand how that assists the plaintiff. The Legislature has authorized the defendants to make Beta-naphthol, and it is not contested that they are entitled to make it by means of caustic soda. They are not prohibited from making caustic soda for that purpose, and it appears to me that what the defendants are doing or proposing to do in this respect falls exactly within what Lord Selborne refers to as something "incidental to or consequential upon"

(1) 10 App. Cas. 354. (2) 5 App. Cas. 473, 478.
(3) L. R. 7 H. L. 653.

a thing which the Legislature has authorized, there being no prohibition in respect of it.

Lord Blackburn says exactly the same thing (1): "I quite agree with what James L.J. has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited."

The plaintiff then turned to the omnibus cases, which are wholly and entirely different.

In *Attorney-General* v. *London County Council* (2) it was held that the London County Council being a purely statutory body and entitled to run and maintain tramways were not thereby entitled to run an independent omnibus business. It is very difficult to apply this. The plaintiff says that the manufacture of caustic soda is a separate and distinct business from gas-making. Nobody denies that. But the defendants are not running a general business of manufacturing caustic soda, as the London County Council were running a general business of maintaining omnibuses. They are only making or proposing to make such caustic soda as is a necessary ingredient in converting their naphthalene into Beta-naphthol. That they are expressly authorized to do, and the *London County Council Case* (2) has no application.

In *Attorney-General* v. *Mersey Ry. Co.* (3), another omnibus case, the Mersey Railway, being entitled to run and maintain a certain railway, started and maintained at one of their termini a system of omnibuses, which on the facts was a separate and entirely independent business. Lord Loreburn says: "The rule of law has been laid down in this House to the effect that it must be shown that the business can fairly be regarded as incidental to or consequential upon the use of the statutory powers; and it is a question in each case whether it is so or whether it is not so. In the present instance I do not think that this business of running an

(1) 5 App. Cas. 481.
(2) [1902] A. C. 165.
(3) [1907] A. C. 415.

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omnibus system can be regarded as fairly incidental to or consequential upon this statutory enterprise."

In other words, it was neither incidental nor consequential to the enterprise, or to the right to run a railway, that the company should run a line of omnibuses. That case has no application to the present.

Before leaving the authorities I will just mention the defendants' cases.

In *Small* v. *Smith* (1) Lord Selborne L.C. says: "I entirely adhere to what was said in this House in . . . . *Attorney-General* v. *Great Eastern Ry. Co.* (2), that when you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, prima facie, to follow from the authority for effectuating the main purpose by proper and general means."

One of the main purposes in this case is to convert naphthalene into Beta-naphthol. It is incident to that purpose that caustic soda should be obtained. There is no express or in fact any prohibition as to the method of obtaining it. I cannot see why it is not just as proper and reasonable for the defendants to make it themselves as to buy it, especially if they can make it at so much cheaper a rate than they can buy it from a chemical manufacturer.

There is very little in the chlorine point. It is a fact that in making caustic soda chlorine is produced, and that people are not allowed to store but must get rid of chlorine. There are many methods by which the coal residuals can be converted by means of chlorine, and if, as I think, the defendants are entitled to make the caustic soda required for converting their naphthalene I think they are entitled to use the resulting chlorine for some other conversion of their residuals. There is some suggestion that the defendants are converting their chlorine into bleaching powder, but that point is not raised in the pleadings, and I do not propose to deal with it further.

The real issue is very short. The plaintiff says that the

(1) 10 App. Cas. 119, 129. (2) 5 App. Cas. 473, 478, 481.

making of caustic soda is not one of the defendants' objects. Nobody says it is. The defendants say that one of their objects is to convert their naphthalene into Beta-naphthol by the aid of caustic soda, and that as incident to the exercise of that right they are just as much entitled to make their caustic soda as to buy it, if they deem it convenient or desirable so to do. I think, as the defendants contend, that the test in these cases is not one of absolute necessity on the one hand or mere convenience on the other, but whether the thing objected to is reasonably incidental to carrying out a statutory object. There is nothing in the defendants' statutes in any way limiting the method by which they are to obtain the articles necessary for carrying out the conversion permitted by the statutes. In the absence of any such provision, I cannot understand why it should be worse for them to make caustic soda at 3*l.* a ton for this purpose than to buy it at 9*l.* a ton. Even if those are not the accurate cost figures I still see no reason why, if the defendants are so minded, and believe they can make caustic soda cheaper, better, or more efficiently for their conversion purposes than they are able to buy it in the market, they should not be entitled to do so.

It is entirely fallacious to say that the making of an article required for a particular conversion, and limited to that, is the carrying on of a business different from that conversion. It is merely part of the internal arrangement and management of the conversion process. The defendants are in no sense setting up as caustic soda manufacturers, or carrying on the business of chemical manufacturers of caustic soda in any ordinary sense at all. They rightly contend that so long as they are bona fide seeking to carry out one of their statutory objects the exact method adopted is immaterial, unless that method is forbidden by their statutory constitution.

In *Lyde* v. *Eastern Bengal Ry. Co.* (1) Lord Romilly M.R. says: "As an illustration of the manner by which a railway company might legitimately embark in projects apparently inconsistent with its means and objects, it was suggested

(1) 36 Beav. 10, 16.

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that coals might be necessary for the purpose of the railway, and that thereupon the company might work a coal mine for that purpose, if, by so doing, it could obtain coals cheaper than by the purchase of them, and that by so doing, it would be fair and proper and not really inconsistent with the objects of the company, and that if it did work a colliery for this purpose, it would be foolish to prevent the company from obtaining a profit by the sale of such coals as were raised and not required for the company. The answer to this argument appears to me to depend upon the facts of each particular case. If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the accidental additional profit of selling coals to others; but if the principal object of the colliery was to undertake the business of raising and selling coals, then it would be a perversion of the funds of the company, and a scheme which ought not to be permitted, however profitable it might appear to be. The prohibition or permission to carry on this trade would depend on the conclusions which the Court drew from the evidence."

For these reasons I hold that the defendants are neither doing nor proposing to do anything ultra vires, and the action must be dismissed with costs.

Solicitors: *Baker, Blaker & Hawes; Parker, Garrett & Co.*

G. R. A.

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[1923. A. 1043.]

Local Government—Public Library for two Parishes—Parishes subsequently merged in Metropolitan Borough—Closing of Library—Use of Building for administrative Purposes—Ultra vires—Injunction—Public Libraries Act, 1892 (55 & 56 *Vict. c.* 53), *ss.* 11, 12—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 4—*London (Adoptive Acts) Scheme*, 1900, *cl.* 2, 5—*City of Westminster (Adoptive Acts) Scheme*, 1902.

Premises were erected for use as a public library by the Libraries Commissioners of a parish, and later by arrangement the premises were used as a joint public library for this parish and a neighbouring parish under the Public Libraries Act, 1892. These parishes became merged in a metropolitan borough under the London Government Act, 1899, and the powers, duties, property and liabilities of the Libraries Commissioners for the two parishes were transferred to the Borough Council by the London (Adoptive Acts) Scheme, 1900. The Council subsequently adopted the Libraries Acts for their entire area, and under the City of Westminster (Adoptive Acts) Scheme, 1902, these Acts were directed to be administered by the Council uniformly throughout their area as a single library district. At the outbreak of war the library was closed and the premises used for national purposes. The library had remained closed ever since, except that for a time, as the result of protests by ratepayers, one floor was opened as a reference library. In 1920 the Council decided to incorporate the library premises with their hall for use for administrative purposes, and up to the date of the writ no alternative premises for the library had been procured, while the books of the library had been removed to two other public libraries in the Council's area. This action was brought by the Attorney-General on the relation of the vicar and rector of the two parishes to prevent this use of the library premises :—

Held, that it was ultra vires for the Council to use the library premises for purposes other than a public library, such user not being authorized by the Public Libraries Act, 1892, s. 12 ; and that an injunction ought to be granted to prevent such unauthorized user.

WITNESS ACTION.

The facts in this case are fully stated in the judgment, and they are briefly as follows :—

In or about the year 1889 the parish of St. Martin-in-the-Fields adopted the Public Libraries Acts, and pursuant thereto the Public Libraries Commissioners for the parish acquired a site in St. Martin's Lane and opened there a public library for the parish. In 1893 the parish of St. Paul, Covent Garden,

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adopted the Public Libraries Act, 1892, and came to an arrangement by which the library at St. Martin's Lane was used as a joint library for the two parishes. By the London Government Act, 1899, the two parishes became included in the area of the defendants, and by cl. 2 of the London (Adoptive Acts) Scheme, 1900, the Commissioners for Public Libraries in any existing parish ceased to exist and their powers, duties, property and liabilities were transferred to the Council of the metropolitan borough comprising that parish. By the City of Westminster (Adoptive Acts) Scheme, 1902, it was directed that the Public Libraries Acts, 1892 to 1901, should be administered by the defendants "uniformly throughout the parishes comprised in that city" and that it should form a "single library district."

The library continued in use until the war, when it was closed and the premises used for national purposes by the defendants. Since then the library had remained closed, except between April, 1919, and February, 1922, when as a result of protest by ratepayers, the reference library on the first floor was kept open. In 1920 the defendants decided to incorporate the library premises in the defendants' City Hall for administrative purposes, and up to the date of the writ no alternative premises for the library had been acquired and the books of the library had been removed to two other libraries in the defendants' area.

In these circumstances this action was brought on the relation of the vicar of St. Martin-in-the-Fields and the rector of St. Paul, Covent Garden, claiming a declaration that the defendants were not entitled to use the library building for their own administrative purposes, or to incorporate the same into the defendants' city hall or to use the same otherwise than as a public library, or otherwise than in accordance with the rights of the ratepayers and parishioners of the two parishes with respect thereto, and for an injunction accordingly.

Macmorran K.C., *Giveen* and *W. Lawson Campbell* for the plaintiff. By s. 28, sub-s. 1, of the Public Libraries Act, 1892,

the earlier Public Libraries Acts were repealed, and it was enacted that where the earlier Acts had been adopted for any library district "that adoption shall be deemed to have been an adoption of this Act, and this Act shall apply accordingly." The position therefore is the same as if both parishes had originally adopted the Act of 1892. The library vested in the defendants under the London (Adoptive Acts) Scheme, 1900, with the same powers and duties as the Commissioners for Public Libraries of the parishes had had. The powers of the defendants in regard to the library premises are therefore those contained in the Public Libraries Act, 1892, ss. 11, 12. (1)

Under s. 12 a sale or exchange of library premises can only be effected with the leave of the Local Government Board (now the Board of Education). In fact there is here no question of sale or exchange nor has the leave of the Board of Education been obtained. The incorporation of the library premises in the City Hall is therefore ultra vires:

(1) The Public Libraries Act, 1892, s. 11: "(1.) The library authority of any library district may, subject to the provisions of this Act, provide all or any of the following institutions, namely, public libraries . . . . and for that purpose may purchase and hire land, and erect, take down, rebuild, alter, repair and extend buildings, and fit up, furnish, and supply the same with all requisite furniture, fittings, and conveniences."

Sect. 12:—"(1.) For the purpose of the purchase of land under this Act by a library authority the Lands Clauses Acts, with the exception of the provisions relating to the purchase of land otherwise than by agreement, shall be incorporated with this Act."

"(2.) The library authority of any library district which is an urban district may with the sanction of the Local Government Board appropriate for the purposes of this Act any land which is vested in that authority."

"(3.) A library authority may with the sanction of the Local Government Board sell any land vested in them for the purposes of this Act, or exchange any such land for other land better adapted for these purposes, and the money arising from the sale or received by way of equality of exchange shall be applied in or towards the purchase of other land better adapted for the said purposes, or may be applied for any purpose for which capital money may be applied, and which is approved by the Local Government Board."

"(4.) A library authority may let a house or building, or any part thereof, or any land vested in them for the purposes of the Act, which is not at the time of such letting required for those purposes, and shall apply the rents and profits thereof for the purposes of this Act."

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Attorney-General v. *Sunderland Corporation* (1); *Williamson* v. *Sunderland Corporation* (2); *Attorney-General* v. *Teddington Urban Council* (3); *Attorney-General* v. *Hanwell Urban Council* (4); *Attorney-General* v. *Pontypridd Urban Council.* (5) These cases arise under other Acts, but they show that when property is acquired by a local authority for a particular purpose it is ultra vires to use it for other purposes, and that its use can only be varied to the extent and in the manner expressly authorized by statute. The plaintiff is therefore entitled to the declaration asked for.

It will be suggested, however, that even so the Court has a discretion with regard to granting an injunction and that in this case the Court ought to refuse the injunction asked for. The authorities give some indication that the Court has a discretion even when suit is brought by the Attorney-General in the public interest. In *Attorney-General* v. *London and North Western Ry. Co.* (6), however, the Court refused to accept the contention that the right to an injunction depended on proof of damage to the public by the breach of a statutory obligation: see also *London County Council* v. *Attorney-General.* (7) But in *Attorney-General* v. *Wimbledon House Estate Co.* (8) it seems to be assumed that the Court has a discretion in granting an injunction. Here, however, the matter is not a trivial one, but a matter affecting the public seriously, as shown by various reports of the Public Library Committee of the defendants indicating the great use that was made of the library until it was closed in 1914. The defendants having acted ultra vires in appropriating the library for other purposes, an injunction ought to go restraining them from doing so.

Maugham K.C. and *Alan Ellis* (*Sheldon* with them) for the defendants. Under the Public Libraries Act, 1892, there is no obligation to maintain a library as such. This is shown by the provisions of s. 12, enabling the library authority to sell with the consent of the Board of Education and to let the library premises. If then the Libraries Commissioners for the

(1) (1876) 2 Ch. D. 634.
(2) (1892) 9 Times L. R. 143.
(3) [1898] 1 Ch. 66.
(4) [1900] 2 Ch. 377.
(5) [1906] 2 Ch. 257.
(6) [1900] 1 Q. B. 78, 85.
(7) [1902] A. C. 165.
(8) [1904] 2 Ch. 34, 42.

two parishes were still in existence they would be free to let the premises to the City Council for the purpose of this hall. It is true that a proper rent would have to be fixed and the rent be applied for the purposes of the Act of 1892. The defendants as library authorities are, it is submitted, entitled to lease the premises notionally to themselves as City Council; and they are ready to set aside a rent to be applied for the purposes of the public libraries. The action is really brought upon a technicality.

The cases cited on behalf of the plaintiff mostly arose under the Public Health Act, 1875, ss. 174, 175 and 176, and they have no bearing on this case. All that was decided was that land acquired under that Act for one purpose by a local authority could not be diverted to another purpose; if not required for that original purpose it could only be sold: compare *Attorney-General* v. *Teddington Urban Council* (1); *Attorney-General* v. *Hanwell Urban Council*. (2) That also was the decision in *Attorney-General* v. *Pontypridd Urban Council* (3), where land was acquired under the Electric Lighting Acts, which contain provisions similar to those in the Public Health Act, 1875. The Public Libraries Act, 1892, allows, however, not merely a sale but a sale or exchange or letting. The fair inference is that the City authority are not bound to employ the library premises as a library, there being other library facilities within their area. Further, the defendants are free under the Local Government Act, 1888, s. 65, and the London Government Act, 1899, s. 5, sub-s. 2, to acquire land and use it for any purpose.

[TOMLIN J. That cannot assist the defendants, as the library premises were not acquired under that power.]

The transfer of property to the defendants effected by the London (Adoptive Acts) Scheme, 1900, cl. 2, is in general terms, and there is no express limitation of the purpose for which the property may be used.

Again assuming that the course being pursued by the defendants is not sanctioned by statute, the Attorney-General

(1) [1898] 1 Ch. 66. (2) [1900] 2 Ch. 377.
(3) [1906] 2 Ch. 257.

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is not entitled as of right to have it restrained by injunction, as there is no direct statutory prohibition of their action and it cannot be shown that their action is injurious to the public interest. It is contended that the Attorney-General has no right to intervene to prevent a course of action by a statutory body which is not the subject of express statutory prohibition and not contrary to the public interest; and certainly the Court in the exercise of its discretion will refuse to grant an injunction in such a case: *Attorney-General* v. *Great Eastern Ry. Co.* (1); *Attorney-General* v. *Wimbledon House Estate Co.* (2); *Attorney-General* v. *West Gloucestershire Water Co.* (3); *Attorney-General* v. *Grand Junction Canal Co.* (4); *Attorney-General* v. *Birmingham, Tame and Rea Drainage Board* (5); Kerr on Injunctions, 5th ed., pp. 170, 587. *Attorney-General* v. *Garner* (6) shows that the right of action of the Attorney-General is based on injury to the public generally.

Macmorran K.C. in reply. The position of a statutory corporation such as the defendants is different from that of a corporation created by charter, and a statutory corporation can only do what is authorized by Parliament: *Attorney-General* v. *West Gloucestershire Water Co.* (3) Under the Public Libraries Act, 1892, the defendants can only dispose of the library premises in two ways—namely, by a sale sanctioned by the Board of Education, and no such sanction has been obtained, or by a letting. The Act does not authorize a notional letting such as has been suggested. In fact the letting must be a temporary letting of property which has been acquired and is not for the moment required for library purposes. It would be extraordinary if while a sale required the consent of the Board of Education the library authority was free to let for 100 years. Lastly, the Court is bound at the instance of the Attorney-General to restrain an ultra vires act by a statutory corporation: compare *Islington Vestry* v. *Hornsey Urban Council.* (7)

Cur. adv. vult.

(1) (1879) 11 Ch. D. 449, 482.
(2) [1904] 2 Ch. 34, 42.
(3) [1909] 2 Ch. 338, 340, 346.
(4) [1909] 2 Ch. 505, 517.
(5) [1912] A. C. 788, 812.
(6) [1907] 2 K. B. 480.
(7) [1900] 1 Ch. 695, 706.

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Jan. 30. TOMLIN J. delivered the following written judgment :—

This is an action by His Majesty's Attorney-General on the relation of the vicar of St. Martin-in-the-Fields and the rector of St. Paul, Covent Garden, against the Mayor, Aldermen and Councillors of the City of Westminster, claiming "a declaration that the defendants are not entitled to use the said public library for their own administrative purposes, or to incorporate the same into the defendants' City Hall or to use the same otherwise than as a public library, or otherwise than in accordance with the rights of the ratepayers and parishioners of the said Parishes with respect thereto."

The facts of the case are as follows. In or about the year 1889 the parish of St. Martin-in-the-Fields adopted the Public Libraries Acts then in force, and established in pursuance of the powers of such Acts upon the premises in St. Martin's Lane, the subject matter of this action, a public library for the benefit of the parish, the library being vested in a body of Commissioners constituted under the Acts. By arrangement with the parish of St. Paul, Covent Garden, the latter parish was given the right to participate in the benefits of the library. In the year 1892 the Public Libraries Act, 1892 (being an Act to consolidate and amend the law relating to public libraries), came into force. By s. 28 of that Act the earlier Public Libraries Acts were repealed, and it was enacted that where the earlier Acts had been adopted for any library district, that adoption should be deemed to have been an adoption of the Act of 1892, and that such last-mentioned Act should apply accordingly.

Under the London Government Act, 1899, the defendants were constituted a metropolitan borough, with an area which included the two parishes. By s. 4 of the London Government Act, 1899, it was enacted that: "On the appointed day every elective vestry and district board in the county of London shall cease to exist, and, subject to the provisions of this Act and of any scheme made thereunder, their powers and duties, including those under any local Act, shall, as from

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the appointed day, be transferred to the council for the borough comprising the area within which those powers are exercised, and their property and liabilities shall be transferred to that council, and that council shall be their successors. . . . .'' By sub-s. 2 of the same section it is provided that: "Where any of the adoptive Acts is adopted within a borough, the borough council shall be the authority for administering the Act; and where any such Act has been adopted before the appointed day, and is administered by commissioners or a board, a scheme under this Act shall abolish the commissioners or board, and transfer their powers, duties, property, and liabilities to the borough council." By sub-s. 3 it was provided that: "The powers of a borough council shall, save as in this Act mentioned, extend to the whole of their borough." Then by sub-s. 4 there was this provision: "Any of the adoptive Acts may be adopted in a metropolitan borough in like manner as in a borough outside London, and not otherwise, and where any of the adoptive Acts adopted before the appointed day does not extend to the whole borough, the Act may be adopted in the rest of the borough in like manner as if it were a separate borough and the borough council were the council thereof."

By cl. 2 of the London (Adoptive Acts) Scheme, 1900, which was approved by Order in Council on August 7, 1900, and was a scheme made under the Act of 1899, it was provided as follows: "The Commissioners . . . . for public libraries and museums . . . . administering any of the adoptive Acts in any existing parish or district in London, shall, as from the appointed day, cease to exist, and their powers and duties and, subject to any adjustment under the London (Financial Arrangements) Scheme, 1900, their property and liabilities and their existing officers shall as from that day be transferred to the council of the metropolitan borough comprising the existing parish or district, or the greater part thereof." By cl. 5 of the same scheme it was provided as follows: "The Public Libraries Acts, 1892 and 1893, shall as from the appointed day . . . (*b*) be in force in such parts of the metropolitan boroughs mentioned in Part II.

of that [the sixth] Schedule as are comprised in the Parishes specified in the second column thereof." Part II. of the Sixth Schedule to the order contained in the first column the borough of Westminster and in the second column the names of the parishes in question.

In the City of Westminster (Adoptive Acts) Scheme, 1902, another Scheme under the same Act, there was a preamble which recited that the Public Libraries Acts, 1892 and 1893, were, before the appointed day, adopted in certain parishes, including the parish of St. Martin-in-the Fields and St. Paul, Covent Garden, and were administered "in the parishes of St. Martin-in-the-Fields and St. Paul Covent Garden by Commissioners"; and it recited that by virtue of the London Government Act, 1899, and of the London (Adoptive Acts) Scheme, 1900, to which I have referred, the powers, duties, property and liabilities of the said Commissioners under the Public Libraries Acts "were, as from the appointed day, transferred to the Mayor, Aldermen, and Councillors of the City of Westminster," and that the adoptive Acts had, since the appointed day, been adopted by the Mayor, Aldermen and Councillors for the rest of the City in pursuance of the powers conferred by sub-s. 4 of s. 4 of the Act, which I have read. By cl. 1 of the Scheme it was provided that: "Subject to the provisions of this Scheme, and if and so far as the provisions of this Scheme are not affected by the Act: . . . (*c*) the Public Libraries Acts 1892 to 1901 shall be administered by the Mayor, Aldermen and Councillors uniformly throughout the parishes comprised in the City, and the City shall form a single library district for the purposes of those Acts." It was also provided that: "The expenses incurred by the Mayor, Aldermen and Councillors under the adoptive Acts shall be treated as their expenses within the meaning of section 10 of the Act, and that the section and any scheme made thereunder shall apply accordingly." By the combined effect of the Act of 1899 and the Schemes to which I have referred, the library in question became vested in the Council of the defendants as the library authority of the City under the Public Libraries Acts.

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It appears from the report for the years 1913–14 of the Public Libraries Committee of the defendants that, measured by the total issue of books, the St. Martin's Lane Library was then the most-used library in the City, the total issue for the year ended March 31, 1914, amounting to over 202,000 books, compared with 150,000 books in the library in the City showing the next biggest issue. After the outbreak of war the library, by reason of the exigencies of the times, was occupied for certain purposes connected with food control and other matters arising out of the war, and was closed to the public. In the early part of the year 1919 letters were addressed to the chief librarian of the defendants by rate-payers in the neighbourhood of the library, urging its reopening, and as a result the reference department of the library was reopened in April, 1919; but the remainder of the library still remained closed.

The defendants' City Hall is situate in Charing Cross Road, in close proximity to the St. Martin's Lane Library; the two properties are in fact back to back, the City Hall facing on Charing Cross Road and the library on St. Martin's Lane. On March 18, 1920, the defendants, the City Council, adopted a report of their General Purposes Committee which, after stating that the existing accommodation in the City Hall was inadequate, approved a proposal for appropriating and incorporating in the City Hall the library premises. The report contained the following passage: "A proposal has been submitted to us that owing to the proximity of the Public Library, St. Martin's Lane, to the City Hall, the Library premises should be appropriated and incorporated in this building and that other premises should be found for a Library. It has been suggested that the upper floor of the premises of the London City Westminster and Parr's Bank which adjoins the City Hall should be acquired if possible and would form an admirable means of linking up the City Hall and the Library premises and at the same time provide considerable additional accommodation. These floors are at present in the occupation of the London County Council, but we understand will be vacated by them as soon as

accommodation at the new County Hall is available. The present position of the City Hall is most convenient and central for the work of the Council, and we are of opinion that the extension of the existing premises on the lines suggested above would be most convenient. To utilise the St. Martin's Lane Library for administrative purposes and find another site elsewhere for a library in substitution for the existing library would, we consider, be more economical than the purchase of another site for a City Hall. We referred the matter to the Public Libraries Committee for their consideration, and have received a presentment from them in reply that they fully recognise the extreme urgency of acquiring further accommodation for administrative purposes and therefore cannot oppose the proposal for the appropriation of the St. Martin's Lane Library premises. In acquiescing they are also influenced by the fact that the accommodation of St. Martin's Lane Library has ceased to be sufficient, and they themselves would within a short time have been faced with the necessity for an extension of the present building or the provision of a larger one." At the same meeting the Council adopted a report of the Public Libraries Committee, which contained the following passage: "We have had referred to us for our observations the report of the General Purposes Sub-Committee re accommodation at the City Hall. We have fully considered the proposals made in regard to this matter and, while very reluctant that there should be any deprivation to the public of existing library facilities, especially at a time when the demands of education are being increasingly pressed, we nevertheless are bound to recognise the urgent need for further accommodation as set out in the Sub-Committee's report. As stated by us in our presentment to the General Purposes Committee we are largely influenced in our acquiescence by the fact that accommodation at St. Martin's Lane Library has for some time past ceased to be sufficient for the library's purposes. This fact alone would, before long, have obliged us to recommend either an extension of the present building or the provision of one more suitable. We therefore note with satisfaction that the Sub-Committee's

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report embodies a proposal that other library premises should be provided in lieu of the library building which it is now suggested should be incorporated in the City Hall, and we trust that it will be done at as early a date as possible. This, however, will be no easy matter and it will perhaps be a period of some years before it can be carried into effect. We feel sure that the Council will desire that, in the meantime, the fullest possible service to the reading public should be given in the other libraries, and will realise that there is urgent need for improvements, alterations and extensions, which have for some time past been contemplated, but which were impossible to carry out during the war. The Council at their last meeting adopted certain recommendations made by us with this end in view in regard to alterations and rearrangement of departments at Great Smith Street Library. The 35,000 volumes to be transferred from St. Martin's Lane Library, forming a valuable and useful collection, should be made fully usable in the other main libraries at Great Smith Street and Buckingham Palace Road. The dividing of the collection between these two buildings is necessary owing to exigencies of space." Then they made a number of recommendations, one of which was: "That the Council resolve that it is necessary that steps be taken forthwith for acquiring a suitable site in the immediate vicinity for the erection of an adequate building as a public library in place of the St. Martin's Lane Library, and that we be authorized to pursue the necessary inquiries for report to the Council in due course." On May 20, 1920, the Council adopted the following report of the Public Libraries Committee: "We have duly considered the following Motion by Councillor J. McMaster referred to us by the Council on the 22nd April, 1920, for consideration and report:—'That in consequence of the resolution of the Council to utilise the St. Martin's Lane Library for administrative purposes and incorporate it with the City Hall it be referred to the Public Libraries Committee to rent temporary premises in the vicinity and open them as a temporary lending library until a permanent site is acquired and a library erected and opened thereon, in substitution

for the St. Martin's Lane Library.' The question of providing a temporary lending library was before us on the 14th April last when we instructed the officers to make inquiries regarding suitable premises. Exhaustive inquiries have been made, but up to the present time no suitable accommodation has been acquired. We are continuing our inquiries, but failing suitable premises being found, we are of opinion that it might be possible to obtain the desired accommodation by the erection of a temporary structure on an open space within a convenient distance of St. Martin's Lane Library. We have accordingly directed the Chief Librarian in consultation with the City Engineer to make the necessary investigations and to report to us as to the practicability of the suggestion. We will submit a further report on this question as soon as possible." On July 22, 1920, the Council adopted the annual report of the same Committee, which contained the following passage : " The St. Martin's Lane Library, with the exception of the reference department, is still in the occupation of the City Council for Registration purposes and the Food Control Departments. A resolution of the Council that the whole building should be appropriated for extension of the City Hall prevents your Committee from taking any steps towards opening the other departments. The possibility of providing temporary accommodation in the neighbourhood for library services is under consideration, but, so far, no suitable premises have been found." At the same meeting the Council adopted the report of the Public Libraries Committee in the following terms : " We reported to the Council on the 20th May last, that we had had under consideration, as directed by the Council on the 22nd April, the question of providing a temporary lending library, and that instructions had been given for further inquiries to be made. These have been made in every direction both with a view to finding provisional accommodation for a temporary library and also as regards a site for a permanent central library. There is great difficulty in finding suitable temporary premises in the immediate neighbourhood, and we are not yet able to submit any definite proposal, either as to a temporary lending

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library or a site for the permanent library. The officers have, however, been instructed to continue their inquiries and a further report will be submitted in due course." On October 14, 1920, the Council referred back their report to the Public Libraries Committee dealing with proposed alterations to another library in the City—namely, Great Smith Street Library. This report contained the following passage: "In consequence of the great rise in the cost of building work since our proposals for the reconstruction and remodelling of this Library"—that is Great Smith Street Library—"were first approved by the Council, we have reconsidered in detail the various alterations and extensions projected, with a view, if possible, of modifying them so as to reduce the expenditure to the amount sanctioned. After careful consideration we are assured that the extent of the work cannot be in any way curtailed without seriously diminishing the efficiency of the library. We are also of opinion that no advantage would be gained by deferring for the time being the execution of all or part of the suggested works. No reduction in price of labour or materials is anticipated for a considerable time; on the other hand it is not improbable that prices will continue to rise. Apart from this reason for not deferring the work, we feel that the use of the library should be restored to the public without further delay, the demand for this being more insistent owing to the partial closing of the St. Martin's Lane Library. When this latter establishment is finally closed as already decided upon by the Council, the eastern half of the City will be without library facilities of any kind." On November 11, 1920, the Council adopted a report of the Public Libraries Committee, which is in the following terms: "Consequent upon the Council's decision to acquire the St. Martin's Lane Library building for administrative purposes it became necessary for us to submit further proposals which were approved by the Council on the 18th March last for providing additional accommodation at Great Smith Street Library to utilise the books displaced from the former establishment pending the erection of a new library"; and again in another passage: "As

authorised by the Council on the 18th March last, we have made inquiries regarding a site for a Library in place of the St. Martin's Lane Library, which the Council have decided to utilise for administrative purposes. After considering a number of sites in the vicinity of the present building which would be suitable for the erection of a Library we have to report that the acquisition of a satisfactory site would involve very heavy expenditure, which, having regard to the pressing need for economy, we are unable to recommend at the present time. We are of opinion that, in view of the high prices ruling for sites and the cost of building, it will probably be some years before a new Library can be erected." On March 17, 1921, the Council adopted the following report at the same Committee: "Owing to the impossibility of obtaining at the present time any suitable accommodation for a temporary lending library in place of St. Martin's Lane Library, we have considered as to putting into force a temporary arrangement for supplying borrowers in the neighbourhood of the City Hall with books. It has been suggested to us that an office be provided at St. Martin's Lane Library at which requisitions for books could be left, the books being brought to the office from Buckingham Palace Road Library and called for by the borrowers. We think that the adoption of this suggestion would meet to some extent the demand for borrowing facilities in this neighbourhood, and have given instructions for the scheme to be put into force as a tentative measure, applying it for the present to all classes of books except fiction and children's books. Arrangements have been made with the Highways Committee for the conveyance of the books between the two libraries."

On June 1, 1921, the vicar of St. Martin-in-the-Fields wrote to the Clerk of the Council a letter of protest against the closing of the library. In February, 1922, the defendants closed the reference department of the library, which had been the only part open since 1919, with a view to making the necessary physical alterations for incorporating the premises into the City Hall. In fact a small part of the library premises has been let to an adjoining bank, and

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the alterations for throwing the remainder of the library premises and the City Hall into one have not proceeded beyond making a new approach to the old library through the City Hall premises in Charing Cross Road, and providing certain lavatory accommodation in the basement. No part of the old library premises are yet being used for the new purpose. A proposal to acquire a site for a new library in Orange Street was subsequently considered ; but on December 21, 1922, the consideration of such proposal was adjourned sine die.

On January 12, 1923, the relators and the rector of St. Anne's, Soho, wrote to the Town Clerk informing him that they, being seriously perturbed by the resolution of the City Council closing and diverting the library for the extension of the City Hall and by the indefinite postponement of the promise that another library would be taken, had taken legal opinion and were advised that the decision of the Council was illegal. On May 17, 1923, after some further correspondence, in which the Council made it clear that they did not intend to resile from the position which they had taken up, the writ in this action was issued. The statement of claim was delivered on June 12, 1923. At a meeting of the defendants' Council on June 21, 1923, recommendations of the General Purposes Committee that a temporary lending library should be established in the basement story of the old library premises and that certain land of the defendants in Wardour Street, acquired in connection with street widening, should be considered with reference to its suitability for a site for a new library were adopted ; and on July 26, 1923, the Council adopted the recommendation of the same Committee that the Council allocate for the purposes of a public library two floors of a building to be erected at a future date on so much of the land in Wardour Street as should remain after the widening of that street had been carried out. The temporary lending library in the basement of the old library, the establishment of which was recommended on June 21, 1923, will not be ready for the use of the citizens for some months ; and it is anticipated that the site for the proposed

erection in Wardour Street may not be available for building for five years.

In the light of what I have already stated, it is not, I think, unfair to say that whatever ultimate reorganization of their public libraries may be contemplated by the defendants, the course which they have hitherto followed in connection with the St. Martin's Lane Library has been operating to subordinate library interests to the general administrative convenience of the defendants. I am not, however, concerned to inquire into the wisdom of what has been and is being done. The only question for me is whether the proposal to incorporate the library premises into the City Hall is one which the defendants have power to carry out.

Now it is admitted that the defendants are a statutory body, having only those powers which are expressly or impliedly conferred upon them by the statutes affecting them, or which are necessarily ancillary to such powers. The premises in question were acquired, or must be treated as acquired, under and are held for the purpose of the Public Libraries Acts. So far as these Acts are concerned, the only sections said to be relevant are ss. 11 and 12 of the Act of 1892. [His Lordship read s. 11, sub-s. 1, and s. 12.] There is not under these provisions any express power, and it is not suggested that there is any implied power, which would justify the appropriation by the defendants of the library premises to uses as a City Hall; but it has been contended that the transaction is either a notional sale or exchange, or a notional letting of the library premises by the defendants as library authority to the defendants as municipal authority, and, as such, justified by s. 12 of the Act. I think the short answer to that contention is that the statute does not provide for any such notional transaction as that which has in fact taken place; and that in any case the defendants have not dealt with the matter as a sale, exchange or letting, either in fact or notionally, or otherwise than on the footing that they are entitled to use the library premises for any of their statutory purposes as they may think fit. It is only necessary to add that the sanction of the Board of Education is

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necessary to a sale or exchange, and that no such sanction has been sought or given.

The defendants are, therefore, unable to rely upon the powers in the Public Libraries Acts; and they have been unable to point to any other statute which assists them. Some argument was based upon the form of the London (Adoptive Acts) Scheme, 1900, cl. 2, but it is, I think, plain that under that Scheme (made as it was under s. 4, sub-s. 2, of the London Government Act, 1899) no greater power could be transferred to the defendants than had been previously vested in the library authority who were their predecessors in title; nor do I think that the defendants derive any assistance from s. 5, sub-s. 2, of the London Government Act, 1899, and s. 65 of the Local Government Act, 1888, to which reference was also made.

My conclusion, therefore, is that the defendants, in relation to the library premises stand in the same position as the original library authority, and have no power to use the premises in the manner proposed.

It is then said that the relief given ought to be confined to a declaration, and that no injunction should be granted. It is contended that the Court has a discretion as to granting an injunction, even in an action in which the Attorney-General is plaintiff; and that if it is really for the public benefit that that should be done which is proposed to be done, an injunction should be refused. I accept the view that the granting of an injunction is a matter of discretion. The question in any particular case or class of case is what are the circumstances which justify the exercise of the discretion in the direction of a refusal of the injunction? I do not, however, accept the view that where the Attorney-General is suing to restrain an illegal or unauthorized act on the part of a public body, it is the function of the Court, before granting an injunction, to investigate whether the act complained of, though found to be illegal or unauthorized, is (measured by some standard, which counsel at the Bar has not defined) for the public benefit. In my opinion, the public benefit is best secured by public bodies acting within

the frontiers of their powers. There may be cases where some special circumstance will justify the refusal of an injunction; but speaking generally, where the Court concludes that an unauthorized user for a permanent purpose is intended to be made of the property of a public authority, I do not think that an injunction ought to be refused, even if it were shown that advantages would result to the public from what is intended to be done. In the present case there is nothing which, in my judgment, justifies a departure from this course. An injunction will, therefore, follow the declaration.

The declaration will be a declaration that the defendants are not entitled to use the library premises for their administrative purposes, or to incorporate the same in the City Hall, or to use the same otherwise than for the purposes of the Public Libraries Acts; and the injunction will follow the same form. The incorporation of the premises into the City Hall has not yet taken place; and I see no ground for suspending the operation of the injunction.

The defendants must pay the costs of the action.

Solicitors: *Travers-Smith, Braithwaite & Co.; Allen & Son.*

H. C. G.

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Feb. 6.

In re MILNER-GIBSON-CULLUM.

CUST *v.* ATTORNEY-GENERAL.

[1923. M. 2517.]

Will—Specific Bequest of Portrait to National Portrait Gallery—Inaccurate Description of Subject Matter of Gift—Doubt as to Authenticity—Retainer of Portrait by specific Legatees.

A testator, who was a collector of valuable pictures and objects of art, amongst other bequests to public bodies gave to the trustees of the National Portrait Gallery "my portrait of Charles Howard Earl of Nottingham," and appointed a residuary legatee. The portrait was sent to the trustees, there being no doubt as to the identification of the picture intended to be given; but the trustees expressed considerable doubt whether it was correctly described as a portrait of the Earl and did not propose to exhibit it. The executors of the testator claimed that it should be returned for the residuary legatee, but the trustees declined to do so except under the advice of the law officers of the Crown:—

Held, that even assuming the portrait to have been inaccurately described as a portrait of the Earl, that did not destroy the gift. The specific legatees took it for what it was worth, and were not bound to return it.

ADJOURNED SUMMONS.

By his will dated September 19, 1921, George Gery Milner-Gibson-Cullum, of Hardwick House, Bury St. Edmunds, after appointing the plaintiffs, Lionel Henry Cust, the Rev. Leslie Mercer Reginald Gurney, and Rowland Holt Wilson, to be his executors and trustees and giving numerous legacies and specific bequests to public institutions and private individuals, gave (inter alia) to the Mayor and Corporation of Bury St. Edmunds for the purpose of being exhibited at Moyses Hall, Bury St. Edmunds, numerous valuable articles, including three lockets containing hair of the Duke of Wellington, tartan of Prince Charles Stewart, and hair of Isaac Newton, and of the Emperor Napoleon the Third. By cl. 11 he gave to the trustees of the National Portrait Gallery, amongst other pictures and miniatures, "my portrait of Charles Howard Earl of Nottingham." By cl. 23 of his will the testator gave all his real estate and other personal estate not otherwise disposed of to his niece, Maud Gurney. The testator died on November 21, 1921. In June, 1922,

the portrait in question was sent by the executors to the trustees of the National Portrait Gallery, but in October, 1922, the executors were verbally informed by the Director of the Gallery that the portrait so sent was not a portrait of the said Earl. The plaintiffs, at the instance of the residuary legatee, then requested that the portrait should be returned; but the trustees intimated that if it should eventually turn out to be a genuine portrait of the Earl, or of some other eminent person, it might be exhibited. Further correspondence ensued, and ultimately by a letter of May 1, 1923, the Director wrote saying that the trustees did not consider that the personage represented was the famous Lord High Admiral, and it could not at present be exhibited as such, and further that the portrait being now national property could not be surrendered except under the advice of the law officers of the Crown.

There was evidence that Charles Howard Earl of Nottingham (1536–1624) was one of the most interesting personalities of his time. He was Lord High Admiral of the Fleet (being then known as Lord Howard of Effingham) at the coming of the Spanish Armada. Lionel Henry Cust, one of the plaintiffs and a former Director of the National Portrait Gallery, and now Surveyor of the King's pictures, stated in his affidavit that the testator was the owner of a considerable collection of objects of art, and gave the most valuable of these for the use of the public. In his view there was no chance of this picture being exhibited as long as the person it represented was not identified. On August 3, 1923, the executors accordingly took out an originating summons to test the question whether the trustees of the National Gallery were entitled to retain this portrait, which was handed over to them by the plaintiffs in the mistaken belief that it was a genuine portrait of the Earl, but believed by the trustees not to be a portrait of him.

F. H. L. Errington for the plaintiffs. There is no subject matter to answer this particular legacy, and the executors are entitled to have this portrait returned for the benefit of the residuary legatee. As appears from the context in the will the testator's object was to have this portrait, as well as

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numerous other objects of interest and value, exhibited to the public. The gift is one by way of specific description, and fails altogether: Theobald on Wills, 7th ed., p. 145; *Waters* v. *Wood*. (1)

The testator never intended to give to a public body a portrait which was not authentic.

Dighton Pollock for the defendants. The motive which actuated the testator in making this bequest is immaterial. He gives a certain picture which is identified and admitted to be the one he intended to give. It may turn out eventually to be the Earl of Nottingham: Jarman on Wills, 6th ed., p. 1255. *Waters* v. *Wood* (1) supports my case. In a sense there was no falsa demonstratio here, the portrait was sufficiently described. *Duke of Leeds* v. *Earl Amherst* (2) was a case in which there was a bequest by a testator of the portraits of himself and three other persons, and of the Duke of Schomberg to his daughter. There were in existence three pictures representing the Duke of Schomberg, one being a large equestrian picture of him, and the question was whether this equestrian picture passed under the bequest, and the Court held that all three pictures passed.

Errington in reply. Where a testator makes a mistake as to the nature of the property which he disposes of, no question of misdescription, or falsa demonstratio, arises; he means to give something which he does not possess: Jarman on Wills, 6th ed., p. 1275. The gift here being void the portrait should be returned.

EVE J. The circumstances of this case are peculiar, if not unique. The testator, a collector of valuable pictures and other objects of art, by his will disposed of many of these treasures by bequeathing them to various public bodies. By cl. 11, among other bequests, he gave to the trustees of the National Portrait Gallery "my portrait of Charles Howard Earl of Nottingham." He was a connoisseur in these matters, and no one for a moment doubts that he lived and died in the belief that the picture to which he referred, and which had descended to him, was in fact a portrait of

(1) (1852) 5 De G. & Sm. 717. (2) (1845) 9 Jur. 359.

Charles Howard Earl of Nottingham. There is no difficulty in identifying the picture he referred to, and in due course the executors handed it over to the trustees of the National Portrait Gallery. The testator no doubt contemplated that it would be exhibited there; but, on the evidence, there is no immediate prospect of this being done, as the trustees have expressed considerable doubt as to its authenticity as a portrait of the Earl. For the purposes of to-day I shall assume that it is not a portrait of the Earl, and will not be exhibited as such unless and until it can be proved that the conclusion arrived at by the trustees is erroneous. In these circumstances the executors, on behalf of the residuary legatee, claim the return of the picture; but the trustees assert a right to retain it on the ground that the picture is the subject matter of the bequest to them, and the mere fact that it is very doubtful from their point of view whether the testator was accurate in describing it as a portrait of the Earl cannot deprive them of their right to the chattel, which it is common ground was in the testator's mind when he penned this bequest. I think the position of the trustees is unassailable. It is not a case where there is no subject matter to answer the gift. Every one knows what the testator was referring to, though the description he gave may not be accurate. I assume that it was inaccurate, but that assumption does not bring the facts within the class of case where there has been no subject matter upon which the bequest could operate. Here there was subject matter, and all that has happened is that the testator has inaccurately described the person portrayed; that, in my opinion, does not destroy the gift; the legatees take it for what it is worth. It may or may not be the portrait of the individual in question, but that uncertainty, or even the certainty of its not being the individual, does not, in my opinion, justify the Court in saying that the legatees are bound to return it. Accordingly I must dismiss this summons, and I do so without costs, as the trustees do not press for them.

Solicitors: *Collyer-Bristow & Co., for Partridge & Wilson, Bury St. Edmunds; The Treasury Solicitor.*

G. M.

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Dec. 5, 6.

WISE *v.* WHITBURN.

[1923. W. 1172.]

Vendor and Purchaser—Title—Implied Covenant—Breach—Damages—Sale by Executors—Assent to specific Bequest—"Actual notice" of Impropriety—Conveyancing and Law of Property Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 7 (1.) (*F*).

In 1922 the defendants as executors contracted to sell to the plaintiffs a London leasehold house with stabling held by the testator for the unexpired residue of a term of eighty years. By his will the testator bequeathed these premises to the defendants as his executors and trustees upon trust to permit his wife to occupy the same during her life, she paying the rent, rates, and taxes and performing the covenants of the lease, and after her death to hold the same upon the same trusts for the benefit of his son, the defendant (who was one of the executors), and his children and other issue as were therein declared of his son's share in the residuary estate. The executors permitted the widow of the testator to continue residing in the house for ten years until her death in December, 1921, she paying the rent and performing the covenants of the lease. The purchasers made a requisition on title to the effect that they knew that the house and premises had been occupied since the testator's death by his widow, according to the trusts of the specific bequest, "which had been assented to," and the executors could not sell until the death of the tenant for life; but the purchasers were willing to accept the title from the tenant for life under the Settled Land Act. To this the reply was made that the tenant for life had died. Both parties acted on the assumption that the leasehold had fallen into the residue, and completed the purchase in 1922. The plaintiffs subsequently agreed to sell the stabling to a sub-purchaser, who took the objection that the executors had no power to sell in 1922. No written or verbal consent to the specific bequest had been in fact given by the executors.

In an action by the plaintiffs for damages for breach of an implied covenant for title by the defendants:—

Held, (1.) That upon the acts and conduct of the parties this legacy had been assented to soon after the testator's death, and the effect was to strip the executors of their title as such, and to clothe them with a title as trustees, so that they had no power to sell as executors.

Attenborough v. *Solomon* [1913] A. C. 76 applied.

(2.) That the plaintiffs, as purchasers from the executors in 1922, had actual notice of this assent by means of the requisition and answer, and were not therefore in the position of purchasers for value without notice of the defect.

(3.) That the executors had no implied power of sale by reason of a power to vary investments in the testator's will:—

Held, therefore, that the case came within s. 7 (1.) (F) of the Conveyancing Act, 1881, and the plaintiffs were entitled to an inquiry as to damages for breach of the implied covenant for title.

WITNESS ACTION.

The plaintiffs Percy Henry Wise and Claude William Wise were a firm of builders and house agents at 38 Ennismore Gardens, Kensington, and the defendants Colonel Charles William Sofer Whitburn, and his sister Mary Florence Christie (married woman), were the executors and trustees of the will of the late Charles Joseph Sofer Whitburn.

The facts are taken in substance from the judgment.

By his will dated September 28, 1900, C. J. S. Whitburn appointed the defendants and his son in law, Robert Bonham Bax Christie, to be executors and trustees, and gave his leasehold dwelling house, No. 16 Ennismore Gardens, to his trustees in trust to permit his wife Fanny: "to occupy the same during her life, if she shall so long continue my widow, she paying the ground rent, premium on Policy of Insurance against fire, and all rates, taxes, and outgoings payable in respect of the said premises, and observing and performing the covenants contained in the lease under which the same is held," and he declared that from and after the decease or second marriage of his said wife (which should first happen) the said leasehold dwelling house and premises were to be held by his trustees upon the same trusts for the benefit of his said son C. W. S. Whitburn, his child, or children, and other issue, as were thereinafter declared of and respecting his share in one moiety of the testator's residuary trust estate. According to the trusts of that one moiety of the residuary trust estate it was to be held by the trustees upon trust to pay the income arising therefrom to his son, the said C. W. S. Whitburn, during his life, and from and after his decease in trust for all or such one or more of the children and remoter issue of his said son (such remoter issue being born during his lifetime) at such ages or times, and in such shares if more than one and generally in such manner as his said son should by his will or any codicil thereto appoint, and in default of such appointment and so far as any such if made should not extend in trust for all the children of his said son who being sons should attain twenty-one, or being daughters should attain that age

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or marry, and if there should be only one child then the whole to be in trust for that one child. The testator died on November 2, 1911, having by a codicil dated the previous day, revoked the appointment of Robert Bonham Bax Christie as an executor and trustee of his will. The estate was a large one, and included real as well as personal property. For some years before and at the date of his death, the testator was living with his wife at No. 16 Ennismore Gardens. This house, together with some stabling known and described as No. 16 Ennismore Gardens Mews, which was also in the testator's occupation, was held by him for the residue of a term of eighty years from June 24, 1868, created by an indenture dated March 25, 1873, subject to an annual rent referred to in the will as a "ground rent" of 165*l.*, and to repairing and other covenants and conditions usually to be found in leases of London houses of this description. The premises had been assigned to the testator in 1884, and his will was proved by the defendants on January 5, 1912. His widow died on December 3, 1921, having continued to occupy the demised premises from the testator's death down to her death, paying the ground rent, rates, taxes, and outgoings, and otherwise performing the covenants and conditions of the lease. On April 26, 1922, the defendants, as executors, offered the premises for sale by auction. They were not then sold, but on November 30, 1922, a contract was entered into for their sale to the plaintiffs according to the conditions prepared for the auction, so far as applicable to a sale by private treaty.

From the abstract of title supplied to the plaintiffs no information appeared as to the testamentary dispositions of the testator, but on verifying the abstract, probate of the will was produced, from which the plaintiffs became aware of the specific trust legacy and the trusts of the residuary estate. Thereupon the plaintiffs' solicitors delivered requisitions on title, of which No. 16 was to the effect that it was within the purchasers' knowledge that the property sold had been occupied since the testator's death in accordance with the trusts of the specific bequest "which has therefore

been assented to, with the consequence that the executors cannot sell until the house falls into the residue at the death of the tenant for life"; but, without prejudice, the purchasers were willing to accept the title of the tenant for life under the Settled Land Act, if she was willing to sell as such. To this requisition the defendants' solicitors merely replied that Mrs. Fanny Whitburn, the tenant for life, had died on December 3, 1921. Both parties thereupon acted on the erroneous assumption that the leasehold premises in question had fallen into the residue under the will, and by a deed dated December 19, 1922, reciting the lease, the assignment to the testator, and his will and probate, the defendants, as his personal representatives, in consideration of 600*l.* paid to them by the plaintiffs, assigned the premises to the plaintiffs for the unexpired residue of the term at the rent and subject to the covenants and conditions reserved by and contained in the lease.

On February 21, 1923, the plaintiffs entered into a contract for the sale of their interest in 16 Ennismore Gardens Mews, but on investigating the title the sub-purchaser raised the objection that the defendants having assented to the specific bequest to themselves of the premises as trustees for the purposes of the trust affecting the same under the testator's will, could not in December, 1922, convey the premises as legal personal representatives, and had in fact no continuing power of sale vested in them. The plaintiffs having looked into this matter and being advised thereon, came to the conclusion that the objection was a valid one. Thereupon they communicated with the defendants' advisers and invited their co-operation in devising some method of overcoming the sub-purchaser's objection to the title.

But the defendants refused to admit that there was any substance in the objection, and accordingly on March 28, 1923, this action was brought by the plaintiffs to recover damages for the breach of the implied covenant for title deemed to be included in the assignment of December 19, 1922. The terms of such covenant were contained in para. (F) of s. 7 of the Conveyancing and Law of Property Act,

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1881. (1) The conduct of the acting executor, Colonel Whitburn, in administering the testator's estate, and the other relevant facts and evidence sufficiently appear from the judgment of the Court.

Gover K.C. and *J. G. Wood* for the plaintiffs. The case comes clearly within s. 7 (1.) (F) of the Conveyancing and Law of Property Act, 1881, and the implied covenant there set out. The assent of the executors to the specific legacy would be an act by the persons conveying whereby the subject matter of the conveyance has become impeached, charged, affected, or incumbered in title within the meaning of that section. On the true construction of the specific bequest the trust in remainder must be treated as a separate independent trust by reference to the trusts of the residuary estate. The title is therefore prejudiced by reason of the assent to the legacy, and the defendants have hindered themselves from conveying the subject matter in the manner in which it has been conveyed. It is true both parties took a wrong view of the construction of the will. A similar thing happened in *Page* v. *Midland Ry. Co.* (2) In *Great Western Ry. Co.* v. *Fisher* (3) there was a defect in title which came within s. 7 of the Act. As to the assent by the executors to the specific bequest that is a question of fact, and is clearly proved by their unequivocal and unambiguous conduct. The tenant for life was left in possession of the house for ten years and performed all the covenants in the lease and paid all rent,

(1) "In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only," namely: "That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed."

(2) [1894] 1 Ch. 11.

(3) [1905] 1 Ch. 316.

rates, taxes, etc. The legal effect of such an assent as this is stated by Lord Haldane in *Attenborough* v. *Solomon* (1), and the executors here have lost their vested right of property as executors, and have no power of sale. It is well established that the assent of executors to a life estate will extend also to the beneficial interests of those entitled in remainder: *Stevenson* v. *Mayor of Liverpool.* (2)

Roope Reeve K.C. and *Bryan Farrer* for the defendants. There are three points in the defence: (1.) There was no assent to the specific legacy in fact, and it cannot be inferred. Inaction is not assent; some act must be done by the executors to establish such assent: Williams on Executors, 11th ed., pp. 1102, 1104. Admittedly no formal assent was ever given, and implied assent by conduct must be quite unambiguous: *Doe* v. *Sturges.* (3) It was only natural that the widow should have been left in possession for a reasonable time. But (2.) assuming that there was assent, the legal estate was in the same persons who were executors and vendors, and they conveyed the property to the plaintiffs, who had no notice of any impropriety in the transaction, and were therefore purchasers for value without notice, and could hold the property against all the world. We submit that there must be actual notice of some impropriety. Knowledge is absolutely necessary. The cases cited on behalf of the plaintiff were different, particularly *Attenborough* v. *Solomon* (4), which was a contract of pledge which does not pass property out and out as on a sale. There was no legal title there; here there is.

In re Kemnal and Still's Contract (5) is an authority for saying that actual notice of an impropriety is necessary. Warrington L.J. expressly so stated in that case. In *Sabin* v. *Heape* (6) it was held that a personal representative could sell for payment of debts twenty-seven years after the testator's death under an implied power of sale. *In re Venn and Furze's Contract* (7) was like this case and

(1) [1913] A. C. 76, 85.
(2) (1874) L. R. 10 Q. B. 81, 84.
(3) (1816) 7 Taunt. 217.
(4) [1913] A. C. 76.
(5) [1923] 1 Ch. 293, 310.
(6) (1859) 27 Beav. 553.
(7) [1894] 2 Ch. 101.

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various cases were there discussed, amongst others *In re Whistler* (1) and *In re Tanqueray-Willaume and Landau.* (2) There is no particular limit of time within which executors must sell. A reasonable limit is twenty years.

It is not enough that the purchasers from the executors knew that the specific legatee had been in possession of the house for a considerable time and had been performing the covenants in the lease. But even assuming these two points to be decided against us there was, thirdly, an implied power of sale by reason of the residuary trust in the will settling these leaseholds which contained a power for the trustees to vary the investments of the residuary personalty: *In re Gent and Eason's Contract* (3); *In re Cooper's Trusts.* (4) The Court will be astute to find a power of sale. They also referred to *Thorne* v. *Thorne* (5); *Chamberlain* v. *Chamberlain* (6); *Doe* v. *Guy* (7); *In re Pope's Contract* (8); Underhill on Trusts, 7th ed., p. 521; and Williams on Vendors and Purchasers, 2nd ed., p. 643.

Gover K.C. in reply. There was in fact actual notice by means of the requisition No. 16 and the answer thereto. By the specific gift of this leasehold it was severed from the power of the executors as such, and equitable rights have superseded their powers. There is no trust for sale in the will, and no implication can be made of any power of sale.

EVE J. [after stating the facts and reading s. 7 (1.) (F) of the Conveyancing Act, 1881, continued:] The breach assigned as the cause of action is that the defendants, by assenting to the bequest of the premises in trust for the testator's widow and those entitled in remainder prior to the assignment did and were parties to an act or thing whereby they were hindered from conveying the premises to the plaintiffs in the manner in which they were expressed to be so conveyed, and whereby the premises were impeached or affected in title to the loss or damage of the plaintiffs.

(1) (1887) 35 Ch. D. 561.
(2) (1881) 20 Ch. D. 465.
(3) [1905] 1 Ch. 386.
(4) [1873] W. N. 87.
(5) [1893] 3 Ch. 196.
(6) (1675) 1 Ch. Cas. 256.
(7) (1802) 3 East, 120.
(8) [1911] 2 Ch. 442.

The first question is, was there such a breach as the plaintiffs allege? The defendants deny it, because, they say, there never was any assent by them to the bequest. The question of assent is one, no doubt, mainly of fact. It is not suggested that in order to prove assent it is necessary, to show affirmatively that the executors, either verbally or in writing, formally expressed assent; it is conceded that assent may be implied from conduct on their part, and the plaintiffs rely upon conduct which they say is unequivocal and unambiguous as establishing the assent. The conduct is of this character. The testator left a large estate, and appointed as his executors his son and daughter; the son, as was to be supposed, took the active share in the administration, and has told us that his one desire was to get the estate clear and settled up as quickly as he could. Having regard to the magnitude of the estate no time was lost in obtaining probate. The death was in November and probate was granted in January. No unnecessary time was expended in payment of the debts, which were very small, or in paying or providing for the pecuniary and other legacies, some of them of large amount. Everything was done with as much expedition as circumstances and the magnitude of the estate, which consisted both of realty and personalty, permitted, and the residuary account was passed in June, 1913. Nor was this all. Before the residuary account was finally passed and the duty paid it became necessary to provide for the duty on the specific bequest to which this action relates, and in August, 1912, less than a year after the testator's death, accounts were delivered and the duty paid in respect of the widow's succession and the settlement created by the bequest. All these are acts indicative of the promptness with which this administration was conducted and ultimately concluded, so far as the executors were concerned. Nor do matters rest there. The widow was left in occupation of the house. As was said in the course of the argument, no one would have expected to see her turned out for a reasonable time after the testator's death, but she was left in possession for the whole of the remainder of her life, a period

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of a little over ten years, and her possession was throughout upon the terms imposed upon her as tenant for life by the bequest. She paid the ground rent, rates and outgoings, and observed the covenants of the lease—covenants involving in that period of ten years the expenditure on her part of considerable sums of money. Upon the facts I have already stated I think the conclusion is almost irresistible that the executors had assented to the bequest. But the son has been called on behalf of the defendants, and the parties have agreed to assume that his evidence would have been substantially repeated by his sister had she been able to be present. The defendants submit that this evidence proves that however strong the inference to the contrary may be assent was never in fact given. No one impugns the veracity of the witness, but the crucial question was put to him in these terms: "Did you give any formal assent, verbally or in writing, by any communication to your mother?" And his reply was: "None whatsoever." In my opinion that evidence carried the matter no further. No one ever imagined the executors had ever done anything of the sort, and in my opinion the question remains to be determined, as it would have had to be determined had the executor not been called, that is to say, upon the acts and conduct of the parties. Upon these I am satisfied that I ought to hold, and must hold, that this legacy was assented to at some date very soon after the testator's death; the particular date is not in the least material, enough that it was long before the property was offered for sale in 1922.

It is not disputed that the assent extends to the beneficial interests of the successive tenants for life and all persons entitled in remainder. What then results? The effect of the assent was to strip the executors of their title as executors and to clothe them with a title as trustees. Lord Haldane L.C. in *Attenborough* v. *Solomon* (1) explains the position of executors who had assented in these words: "The executors had [thereby] lost their vested right of property as executors and become, so far as the title to it was concerned, trustees

(1) [1913] A. C. 85.

under the will. Executors they remained, but they were executors who had become divested, by their assent to the dispositions of the will, of the property which was theirs virtute officii; and their right in rem, their title of property, had been transformed into a right in personam—a right to get the property back by proper proceedings against those in whom the property should be vested if it turned out that they required it for payment of debts for which they had made no provision. My Lords, that right always remains to the executors and they can always exercise it, but it is a right to bring an action, not a right of property." In the present case it is clear from that statement of the law that after this legacy had been assented to, the executors had ceased to have any continuing power to dispose of their property as executors and had become trustees. This disposes of so much of the defence as is based upon the assertion that there never was any assent.

Then comes the point upon which the defendants mainly rely. Assuming, they say, there was assent the plaintiffs as purchasers from them after all have got the legal estate; and as they had no notice of the assent before completion they are purchasers for value without notice.

Before one can decide if this is so one has to inquire what would constitute sufficient notice to deprive the purchasers of the protection afforded by absence of notice. The defendants argue that nothing short of actual knowledge that the assent had been given would suffice, that it is not enough to show that the purchasers knew that the legatee was in possession for many years and during the whole period was discharging the obligations and observing the conditions imposed upon her as beneficiary under the will; and that "actual notice" that the assent had been given must be proved before the title can be impeached. I am not prepared to adopt that view. I think a fair way of testing its soundness is to consider what would be the position of the purchasers in an action brought by the infant beneficiaries to impeach the sale. As defendants to such an action constrained to admit knowledge before completion of the facts which it is

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shown were known to them here, could they possibly have maintained a defence founded on absence of notice? I do not think they could. It is true that in the judgment of Warrington L.J. in *In re Kemnal and Still's Contract* (1) this passage occurs: "Their duty"—that is, the duty of the executors—"includes that of the realization of the estate for the purpose of paying debts, funeral and testamentary expenses and legacies, and it is well settled that no purchaser or mortgagee is liable to have his title called in question unless he has actual notice of the impropriety of the transaction." It has been sought in this case to press that language to extreme limits and to impose this meaning upon it, that whatever be the facts within the purchaser's knowledge, and whatever be the inference which any reasonable man would draw therefrom, the purchaser is entitled to disregard the facts of which he has knowledge and to ignore the reasonable inference to which they give rise and can assert his title as a purchaser without notice unless it can be proved that he knew that assent had actually been given. I cannot think that the Lord Justice contemplated any such interpretation being put upon his language. When he says "actual notice" I think he is referring to something more substantial than mere surmise or suspicion, however plausible, and he does not mean to exclude knowledge of facts from which the existence of a certain state of things is reasonably to be inferred. Where such knowledge is proved I think actual notice exists. But if this be an erroneous interpretation of the Lord Justice's language there arises the further question whether the purchasers had not in fact such actual notice as the defendants allege was indicated by the Lord Justice in the passage I have read. The answer to this question turns upon requisition No. 16 and the answer. The requisition is in these words: "It is within the purchasers' knowledge that the property sold has been occupied since the death of the testator in accordance with the trusts of the specific bequest—which has therefore been assented to. The executors therefore cannot sell until the house falls into the residue at the death of the

(1) [1923] 1 Ch. 310.

tenant for life, but without prejudice, the purchasers are willing to accept the title subject to the other requisitions and objections from the tenant for life under the Settled Land Act if she is willing to sell as such." That was an offer by them, on the assumption that the executors had no property in the subject matter of the bequest, to take an assignment from the tenant for life selling under her statutory power. The latter part of the requisition is based on what all parties now recognize as an erroneous view of the effect of an assent to a settled legacy, but I am satisfied that the erroneous view was shared by those who framed the answers to the requisitions. It is clear that both parties were under the impression that any assent by the executors would only have been effective to the extent of the widow's life interest and that on her death the executors would again be able to sell. The answer to the requisition is in these terms: "Mrs. Fanny Whitburn, the tenant for life, died on the 3rd December, 1921." The defendants ask me to read that answer as a denial of any assent and an assertion of the executors' right to sell. I cannot do so. On the contrary I think that according to the true construction of the requisition and answer both purchasers and vendors were under the impression that whether or not there had been assent to the widow's life interest, the matter was quite immaterial, inasmuch as her death had exhausted the effect of any such assent and had restored to the executors their power to sell as executors. In my opinion, so far from repudiating assent by its silence on the subject this answer tacitly admits an assent, but—in common with the requisition—misapprehends the legal effects of such assent. If such be the true construction of the requisition and answer it is obvious that the plaintiffs had actual notice of the assent and it would be no answer on their part to say they misunderstood the legal consequences thereof.

In the course of the argument on this part of the case it was suggested that according to some of the older cases the executors could, notwithstanding assent, still make a good title to a purchaser; that in some way they could withdraw

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their assent and thereupon enter into a binding contract for sale to a purchaser, but no authority was cited going to that length, and I do not think the suggestion is well founded. It was also urged on behalf of the defendants that a power of sale might be imported into the settlement of these leaseholds from the power conferred upon them as trustees in a later part of the will to vary investments of the residuary personalty, but this argument was altogether too far fetched, and I do not think it is necessary to deal further with it. In my opinion, the defence to the action fails, and the plaintiffs are entitled to an inquiry what damages they have suffered by reason of the breach of the implied covenant. The authorities, of which *Page* v. *Midland Ry. Co.* (1) is perhaps the most notable, show, I think, that this is a covenant to the benefit of which the purchasers are entitled, and there is no equity to deprive them of the relief they claim. The defendants must pay the costs of the action.

Solicitors: *Faithfull, Owen, Blair & Wright; Bischoff, Coxe, Bischoff & Thompson.*

(1) [1894] 1 Ch. 11.

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Jan. 18.

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In re EDWARDS.

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[1923. A. 2350.]

Will—Construction—Referential Trusts—Residue settled by Reference to "trusts" of settled Legacy—Power to appoint Life Interest in settled Legacy to Husband—Incorporation into Trusts of Residue of Power—Rule against Multiplication of Charges.

William Arnell by his will, in 1880, bequeathed a legacy of 10,000*l.* upon trust for his daughter Catherine (who afterwards was married to the defendant, G. L. Edwards) for her life, with remainder in trust for such of her children or remoter issue and in such manner as she should by deed or will appoint and, in default of appointment, in trust for her children as therein mentioned and, in default of children and in the events which happened of the testator's son Charles dying in the lifetime of the daughter without leaving issue, in trust for the testator's next of kin at her death. The will then conferred a testamentary power upon the daughter to appoint a life interest in the settled legacy to any husband of hers, such life interest to take effect in precedence of the trusts thereinbefore declared concerning the legacy after the decease of the daughter. The residue was given, as to one moiety thereof, "upon the same trusts as are hereinbefore declared of the legacy of 10,000*l.* hereinbefore bequeathed by me for the benefit of my daughter Catherine Arnell and her issue." The other moiety was settled upon the testator's son Charles for life with remainder for his children, with an ultimate remainder, in default of children, "upon the same trusts, both as to the capital and the income thereof, as are hereinbefore declared of the legacy of 10,000*l.* hereinbefore bequeathed by me for the benefit of my daughter Catherine Arnell and her issue or as near thereto as the circumstances of the case will admit."

The testator's son Charles died in 1894, without having had issue; and Mrs. Edwards died in 1923, without having had issue, and having made certain testamentary dispositions. Thereupon questions arose; first, whether upon the true construction of the testator's will, his daughter, Mrs. Edwards, had power to appoint a life interest in favour of her husband G. L. Edwards in the residuary estate of the testator, and secondly, whether, if she had that power, she had effectually exercised it. As regards the second question, it is sufficient to state that the Court decided that question in the affirmative:—

Held, that upon the true construction of the testator's will, notwithstanding that the bequest of the residue contained no reference in terms to any powers applicable to the settled legacy, inasmuch as the power extended to an appointment of the whole income of the legacy and was not limited to an appointment of a definite sum, the effect of the

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referential words was to make the power of appointment in favour of a husband applicable to the residue as well as to the settled legacy: and such construction of the will did not offend the rule against a multiplication of charges: and that, accordingly, the defendant G. L. Edwards was entitled to a life interest in the residuary estate of the testator as well as in the settled legacy of 10,000*l.*

The principle of the decision in *Cooper* v. *Macdonald* (1873) L. R. 16 Eq. 258 applied.

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William Arnell by his will, dated January 12, 1880, gave the sum of 10,000*l.* to trustees upon trust to invest the same and to pay the income thereof to his daughter Catherine Arnell (who was afterwards married to the defendant George Lucien Edwards) during her life and after her death as to both capital and income in trust for all or such one or more exclusively of the other or others of her children or remoter issue born in her lifetime or within 21 years after her death at such age or time or respective ages or times if more than one in such shares and with such future or executory or other trusts for the benefit of such issue or some or one of them with such provisions for their respective advancement and maintenance and education at the discretion of the trustees or of any other persons and upon such conditions with such restrictions and in such manner as she should by deed or by will or codicil notwithstanding coverture appoint and in default of appointment in trust for all her children at 21 or marriage in equal shares; and in default of children the legacy and the investments representing the same were directed to be held upon trust to pay the income thereof to the testator's widow during her life and subject thereto upon the like trusts for the benefit of the testator's son Charles Arnell and his issue or upon such of the said trusts as should then be capable of taking effect as were thereinafter declared in his and their favour of and in one moiety of the testator's residuary estate: and it was declared that if Charles Arnell should die in the lifetime of Mrs. Edwards and there should be no issue of Charles Arnell living at her death who should attain a vested interest, which events happened, the legacy should be held (subject to the payment of the income thereof to the

testator's widow during her life) upon trust for the testator's statutory next of kin at the death of Mrs. Edwards. Then there followed a proviso and declaration that it should be lawful for Mrs. Edwards by any deed executed before marriage or by will or codicil to appoint unto and for the benefit of any husband of hers who might survive her an interest for his life or any less interest in the legacy to commence from the decease of Mrs. Edwards, such interest to take effect in precedence of the trusts and provisions thereinbefore declared and contained concerning the legacy after the decease of Mrs. Edwards. The testator then gave a legacy of 3000*l.* to his son Charles Arnell, which together with a sum of 7000*l.* advanced to him in the testator's lifetime the testator declared to be equivalent to the 10,000*l.* legacy bequeathed in favour of his daughter, Mrs. Edwards. The testator then gave his residuary estate to his trustees upon trust for sale and conversion and directed them to pay the income thereof to his widow during her widowhood (and if she should marry again then to pay the income of one moiety of his residuary estate to her during the rest of her life), and the testator declared that as to one moiety of his residuary estate as from the death or future marriage of his widow the trustees should stand possessed thereof and of the income thereof "upon the same trusts as are hereinbefore declared of the legacy of 10,000*l.* hereinbefore bequeathed by me for the benefit of my daughter Catherine Arnell and her issue": And as to the other moiety, as from the death of his said widow, the trustees were directed to stand possessed thereof and of the income thereof upon the trusts thereby declared during the life of the son, Charles Arnell, and after his death upon the trusts and with and subject to the powers and provisions therein contained in favour of his issue, and if there should be no child of Charles Arnell who should attain a vested interest then that moiety was directed to be held, but subject to the trusts and powers thereinbefore contained, "upon the same trusts both as to the capital and the income thereof, as are hereinbefore declared of the legacy of 10,000*l.* hereinbefore bequeathed by me for the benefit of my daughter Catherine

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Arnell and her issue or as nearly thereto as the circumstances of the case will admit." And it was thereby declared that, if the daughter should die in the lifetime of Charles Arnell and there should be no issue of hers living at the death of Charles Arnell who should attain a vested interest, then that moiety should be held upon trust for the statutory next of kin of the testator at the death of Charles Arnell, and it was provided that if Charles Arnell should die without leaving any child who should attain a vested interest, it should be lawful for him by deed or will to appoint unto and for the benefit of any wife of his who might survive him an absolute interest or any less interest in one-third part of that moiety, such interest to take precedence of the trusts and provisions thereinbefore declared and contained concerning that moiety after the decrease of Charles Arnell without leaving a child.

The testator died on February 13, 1880. Charles Arnell died on September 25, 1894, leaving a wife him surviving, but without having had issue, and having by his will dated June 24, 1893, appointed his wife sole executrix thereof and having in exercise of the power given him in that behalf appointed for the benefit of his wife one-third part of one moiety of his deceased father's residuary estate.

The testator's widow died on June 3, 1913, without having married a second time.

The testator's daughter, Mrs. Edwards, died on March 9, 1923, without having had issue, leaving her husband George L. Edwards her surviving, and having made certain testamentary dispositions which, for the purpose of this report, it is unnecessary to further refer to, but which her husband contended operated as an effective appointment to him of a life interest both in the 10,000*l.* legacy and in the residue.

In consequence of the failure of issue of both Charles Arnell and Mrs. Edwards, the ultimate trusts declared concerning the residuary estate of the testator became operative, and questions then arose as to the true construction of those ultimate trusts. A summons was, accordingly, taken out by one of the trustees of the will, who also claimed to be beneficially entitled to one-third of the residuary estate under the ultimate

gift over to the testator's next of kin, two of the defendants being persons claiming to be entitled to the other two-thirds under the same ultimate gift over and the third defendant (George Lucien Edwards) being the other trustee of the will and also claiming to be entitled to a life interest in the residue under an appointment contained in his wife's testamentary dispositions. The questions asked by the summons were: (1.) whether, upon the true construction of the will, Mrs. Edwards had power to appoint a life interest in the residuary estate of the testator or in any part thereof to her husband the defendant George Lucien Edwards; and (2.) if she had that power, whether she had effectually exercised it and to what extent. The first question is alone material for this report, as in the judgment of the Court the will of Mrs. Edwards operated as an effectual exercise of her power over the residuary estate of the testator as well as over the 10,000*l.* legacy.

Bryan Farrer for the plaintiff, one of the trustees of the will and also interested as one of the testator's next of kin.

Jenkins K.C. and *Alan Ellis* (for *Sheldon*) for some of the testator's next of kin. The power is limited to the 10,000*l.* legacy and is not applicable to either moiety of the residue. The residue is to be held upon the same "trusts" as those declared of the legacy: there is no reference to the special power in question or even to any powers in general terms. Lord Cranworth L.C. in *Hindle* v. *Taylor* (1) said: "In almost all cases, it is not a reasonable way of reading a trust, created by reference to other trusts, to consider everything as there repeated, and so to make it a duplication, as it were, of trusts in the nature of charges." The facts in this case are distinguishable from those in *Cooper* v. *Macdonald* (2), where the power given was in respect of an annuity which was not to exceed one-third of the income of the original property. The trusts referred to are the trusts declared of the legacy which precede the power, that is to say, the trusts in favour of the daughter's children with remainder in trust for the son and his

(1) (1855) 5 D. M. & G. 577, 594. (2) L. R. 16 Eq. 258.

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children and ultimately for the testator's next of kin. Further the gift over of the second moiety in the event of the daughter dying in the lifetime of her brother without issue living at his death, to a class different from the class to whom it is given by the original settlement in the will of the 10,000*l.* legacy is an indication that the power was not intended to extend to the residue.

[They also referred to *Trew* v. *Perpetual Trustee Co.* (1) and Farwell on Powers, 3rd. ed., p. 124.]

Ward Coldridge K.C. and *Mossop* for the defendant G. L. Edwards, the other trustee and claiming to be entitled to a life interest in the residue. The residue is made an accretion to the 10,000*l.* legacy for all purposes, and the power in question extends to the residue. The interest which the power enables the wife to appoint is indistinguishable in principle from an interest limited to a certain proportion of the income of the property charged. The "trusts" of the legacy must include the trust which would come into existence upon an exercise of the power in favour of a husband.

Bryan Farrer for the plaintiff, interested as one of the testator's next of kin, supported the argument on behalf of the other next of kin and referred to *Hindle* v. *Taylor* (2); *Cooper* v. *Macdonald* (3); and to *In re Campbell's Trusts.* (4)

P. O. LAWRENCE J. This case affords another example of the danger of making a bequest by reference to trusts declared concerning some other bequest. The question which falls for determination is whether the referential words used in the residuary bequest contained in the will of the testator are strong enough to import the power to appoint a life interest to a surviving husband conferred upon the testator's daughter in the bequest of the 10,000*l.* legacy. [His Lordship then stated the facts and continued:] The referential words, therefore, upon which the whole case turns are "upon the same trusts as are hereinbefore declared of the

(1) [1895] A. C. 264, 268.
(2) 5 D. M. & G. 577, 594.
(3) L. R. 16 Eq. 258.
(4) [1922] 1 Ch. 551, 561.

10,000*l.* legacy": and Mr. Jenkins contended that these words are not sufficiently wide to confer upon the daughter a power to appoint to her surviving husband a life interest in the residue, although such a power was conferred upon her in respect of the 10,000*l.* legacy. He pointed out that the exercise of such a power would have the effect of postponing all the trusts declared by the will subsequently to the death of the daughter and relied upon the absence of any express reference to the power and more particularly upon the absence of any general words such as "and subject to the same or the like powers" which are commonly inserted in referential trusts.

I have been referred to two cases which are relied upon as laying down or recognizing the canon of construction applicable to the present will. The first is *Hindle* v. *Taylor* (1), where Lord Cranworth says: "It is not a reasonable way of reading a trust, created by reference to other trusts to consider everything as there repeated, and so to make it a duplication, as it were, of trusts in the nature of charges." The second is *Trew* v. *Perpetual Trust Co.* (2), a case in the Privy Council, where, after referring to the method of construing a referential trust by rewriting the words declaring the trust, substituting the second property for the first, their Lordships say that they "cannot accept the proposed canon of construction in any sense which would give to it the general effect of multiplying charges upon the trust estate, or trusts in the nature of charges." The passages which I have quoted ought not, however, to be divorced from their context.

In *Hindle* v. *Taylor* (1) the testator by his will settled a sum of 5000*l.* by reference to the trusts thereinafter declared concerning a fund of 20,000*l.* bank annuities, one of which trusts was to pay an annuity of 200*l.* out of the income to the widow of the tenant for life, and it was held that the widow was not entitled to a second annuity of 200*l.* out of the sum of 5000*l.* In *Trew* v. *Perpetual Trustee Co.* (2) the testator by his will directed the income of a sum of 20,000*l.* to be paid to his wife during widowhood, and after her marrying again to

(1) 5 D. M. & G. 577, 594. (2) [1895] A. C. 264, 268.

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pay the income arising from 10,000*l.* during the remainder of her life: the ultimate residue was given upon the trusts thereinbefore declared with reference to the sum of 20,000*l.* The widow married again, and it was held that she was not entitled to a life interest in a moiety of the residue nor to a life interest in a second sum of 10,000*l.* These two cases, in my opinion, only reaffirm the well established rule that when property is given upon the same trusts as other property and the latter property is subject to a power to raise a definite lump or annual sum, then the property so given by reference is not subject to an additional charge of the same amount.

On the assumption that a life interest is a trust in the nature of a charge within the meaning of these decisions (a question which I think is open to serious doubt, but upon which, in the absence of argument, I desire not to express any opinion), the case of *Cooper* v. *Macdonald* (1) seems to me to be more in point. This case shows that a distinction must be drawn between cases where the property is subject to a power to raise a definite sum and cases where the power is to raise a charge not exceeding a certain proportion of the value of the property, in which latter case the rule against duplication of charges does not apply, and the power to charge is increased in proportion to the value of the additional property. There, Lord Selborne, after referring to *Hindle* v. *Taylor* (2), says: "I think, however, that the case is different when the power is to appoint an annuity not exceeding a certain proportion of the income of the property charged therewith. In such a case, by the addition of other property to be held on the same trusts 'and subject to the same or like powers' etc., so as to 'correspond with' those before expressed as to the property specifically devised, as nearly as the difference in the nature of the property will admit, the testator has (in effect) increased the total amount of income, of which the maximum annual charge is not to exceed a certain aliquot part. The rule of proportion still holds; but the intention is, that the power, limited by that rule, shall be applicable to the added as much as to the original property."

(1) L. R. 16 Eq. 258, 266. (2) 5 D. M. & G. 577, 594.

Counsel have endeavoured to distinguish that case from the present on two grounds: first, because there the power was to appoint an annuity not exceeding a certain proportion of the income of the original property, whereas in the present case the power is to appoint the whole of the income of the 10,000*l.* legacy, and, secondly, because there the will contained the words "and subject to the same or the like powers, etc.," which are not to be found here. In my opinion, these distinctions are more formal than substantial. The principle underlying the decision appears to me to apply "a fortiori" to a case where the annuity is equal to the total income of the property charged therewith, and the absence of the common form words does not seem to me fatal, if on the particular will it is evident that they ought to be implied.

In my judgment, however, the real question to be solved in the present case is, whether the referential trusts declared concerning the residue include the trust which arises in favour of a surviving husband upon an exercise of the power in that behalf conferred upon the testator's daughter in respect of the 10,000*l.* legacy.

It is admitted that the referential trusts would include trusts which the daughter might have created in favour of her children or remoter issue under the power conferred upon her in that behalf, and I see no reason why a trust created by her in favour of her husband under the power given to her in that behalf should be excluded. In my judgment, the effect of the referential words is to make all the trusts and powers (including the power to appoint a life interest to a surviving husband) declared and conferred in respect of the 10,000*l.* legacy (except where otherwise expressly declared) applicable to the residue. To accede to the contention that the referential words apply only to the trusts and powers which precede the power to appoint a life interest to a husband would, in my opinion, be placing too narrow a construction upon those words.

The fact that the power is inserted after the primary trusts of the 10,000*l.* legacy (in which respect this case resembles

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Cooper v. *Macdonald* (1)) does not, in my opinion, have the effect of excluding the trusts created thereunder from the trusts of the residue. On the plain terms of the will, I have come to the conclusion that the testator intended that, in the events which have happened, both the first moiety and also two-thirds of the second moiety of the residue should be held on exactly the same trusts as the 10,000*l.* legacy. I disagree with the suggestion that there is anything capricious in the provision conferring upon the testator's daughter a power to give to her surviving husband a life interest in the whole fund of which she was a life tenant before the capital of that fund went to the other persons entitled after her death. On the contrary such a provision is usual in a settlement of a daughter's share.

It has, however, been argued that there is an indication in another part of the will that the construction which I have placed on the referential words is not the true construction, and that this indication is to be found in the gift of the second moiety of the residue, in the event of the daughter dying in the lifetime of the son without issue living at the death of the son who should attain a vested interest, upon trust for the persons who at the death of the son would be the next of kin of the testator under the statutes of distribution. In my opinion, the only effect of that gift is to substitute another class in the ultimate gift of that moiety in the particular event there mentioned. If that event had happened, the trust in favour of the husband would have taken precedence over the gift to that class, but that fact does not seem to me in any way to indicate that the construction which I have placed on the residuary bequest is not the true construction.

In the result I hold that the defendant G. L. Edwards is entitled to a life interest both in the 10,000*l.* legacy and in five-sixths of the residue.

Solicitors : *Young, Jones & Co. ; G. S. Smith-Spark.*

(1) L. R. 16 Eq. 258, 266.

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Jan. 23.

Education—Non-provided Public Elementary School—Direction to Managers to dismiss Teachers—Dismissal of Teachers by Local Education Authority—Dismissal on "educational grounds"—Mixed Grounds, partly educational and partly economic—Invalidity of Notice of Dismissal—Education Act, 1921 (11 & 12 *Geo.* 5, *c.* 51), *s.* 29, *sub-ss.* 2 (*a*), 6.

The plaintiffs were the headmaster and headmistress respectively of certain public elementary non-provided schools in the City of Sheffield and had attained the age of 60 years. The Council of the Sheffield Corporation, as the local education authority, had, pursuant to s. 4, sub-s. 2 (*b*), of the Education Act, 1921, delegated their powers under that Act to an Education Committee. In December, 1922, the Education Committee requested the Sheffield City Council to provide 345,725*l.*, to be drawn from the local rates, to meet the ordinary expenditure on education for the year ending March 31, 1924. From that sum the Council disallowed 20,000*l.*; and, in order to curtail their expenditure by that amount, the Education Committee resolved upon the dismissal of more than half the number of teachers over the age of 60 years eligible for pensions whom, including the plaintiffs, the Director of Education for the city had recommended for retirement. That resolution was passed under great pressure from the Board of Education and the City Council as an urgent measure of economy and as the only alternative to suspending certain branches of instruction. Further, it was passed in the absence of sufficient information relating to either of the plaintiffs or their schools upon which it could properly be determined whether any and what educational grounds existed to justify their dismissal. In pursuance of that resolution, the Education Committee in April, 1923, directed the managers to terminate their agreements with the plaintiffs, and stated that the educational grounds upon which the Committee based their direction under s. 29 of the Act of 1921, were that, as the plaintiffs had reached the age of 60 and were eligible for superannuation, the educational interests of the schools would be served by their retirement and the appointment of younger teachers. The managers refused to carry out those directions, and the Committee, through the Director of Education, themselves exercised their powers under s. 29, and gave notice to each of the plaintiffs to terminate their engagements, alleging as educational grounds that the Committee were satisfied that, by reason of age, the plaintiffs were not able to perform their duties as efficiently as younger head teachers.

The plaintiffs contested the validity of the notices on the ground that they were not based on educational grounds, as required by s. 29 of the Act of 1921, and brought these actions for declarations that the notices were invalid and inoperative and for relief by injunction. The

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Court, having found as a result of the evidence that the real and only grounds for the dismissal of the plaintiffs were financial and that the alleged educational grounds were merely colourable:—

Held, that the notices of dismissal were not based on educational grounds, as required by s. 29, sub-s. 2 (*b*), of the Education Act, 1921, and were, therefore, invalid and inoperative; the case being covered by the decision in *Hanson* v. *Radcliffe Urban Council* [1922] 2 Ch. 490.

Held, further, that, even if the grounds were mixed grounds, compounded in part of financial and in part of educational grounds, they were not educational grounds within the meaning of that sub-section: see *Reg.* v. *St. Pancras Vestry* (1890) 24 Q. B. D. 371.

WITNESS ACTIONS.

These two actions were tried together, and the following statement of the material facts, which are common to both, is substantially taken from the judgment.

Mr. Sadler, the plaintiff in the first action, who held the teachers' certificate of the Board of Education, was appointed headmaster of the St. Jude's (Moorfields) Church of England School in the City of Sheffield on October 31, 1892; and attained the age of 60 on January 4, 1922. Miss Dyson, the plaintiff in the second action, who was similarly qualified, was appointed headmistress of the girls' department of the St. George's Church of England School in the same city on April 23, 1900; and attained the age of 60 on June 6, 1923. Both schools were public elementary schools not provided by the local education authority for the area in which they were situate. The Council of the Sheffield Corporation was the local education authority for such area, and had, pursuant to s. 4, sub-s. 2 (*b*), of the Education Act, 1921, duly delegated its powers under the Act (except the power of raising a rate or borrowing money) to an Education Committee constituted in accordance with the Act. In the month of April, 1923, the Education Committee, purporting to act under s. 29, sub-s. 2 (*a*), of the Act, caused notices of dismissal to be served upon both Mr. Sadler and Miss Dyson. Each contested the validity of these notices on the ground that they were not given on educational grounds, as required by the section.

The circumstances under which the notices were given were as follows: On December 12, 1922, the Finance Advisory

Sub-Committee of the Education Committee held a meeting, at which it was resolved to recommend that the City Council be requested to provide the sum of 411,570*l.* to meet the estimated net expenditure of the Education Committee during the year ending March 31, 1924. Of that sum, 65,845*l.* was required for interest and redemption charges; and the balance, 345,725*l.*, for ordinary expenditure. On December 18, 1922, at a special meeting of the Education Committee, that recommendation of the sub-committee was approved and confirmed. On January 2, 1923, the estimate came before the Finance Consultative Committee of the City Council, and that Committee allocated only 325,725*l.* for the ordinary expenditure of the Education Committee during the financial year in question, instead of the sum of 345,725*l.*, being a reduction of 20,000*l.*

The Education Committee then referred the question as to how the reduction could be met to its Finance and General Purposes Sub-Committee, which met on January 16, 1923, and instructed Mr. Sharp, the Director of Education for the city, to make a report on the matter. Mr. Sharp accordingly made a report about the end of January, 1923, which contained statements to the effect that by most stringent economies during the then current year the Education Committee had substantially reduced the drafts upon the rates, that those economies had brought the elementary school system of the city to the verge of inefficiency, that, in order to produce a reduction of 20,000*l.* in the demand upon rates, it would be necessary to effect a reduction of a very much larger amount in the gross expenditure; that it must be understood that the proposals were made under duress and that the Education Committee were not able to forecast what action the Board of Education might decide to take in view of the failure of the local education authority to carry out its statutory duties. Amongst the items in respect of which a curtailment of expenditure might be effected, the report suggested two in particular—namely, (1.) the suspension of instruction in domestic science and manual work; and (2.) the retirement

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of certain teachers on superannuation. As regards the former, it was proposed that the instruction hitherto given in the subjects of domestic science and manual work in all the schools should be suspended for a period of two or three years or until the financial circumstances of the city had become much better; in which case the saving from rates would be 3498*l.* in respect of domestic science and 3800*l.* in respect of manual work. As regards the latter, the report stated as follows: "Consideration has been given to the fact that teachers are now eligible under a very generous superannuation scheme of the Government to retire on pension at the age of 60 years. The number of such teachers is 70, and if the whole of these teachers were retired on pension, the gross saving in salaries would be 11,800*l.* with a net saving to the rates of 4720*l.* The school inspection staff report, however, that in by far the large majority of cases the teachers eligible to retire on pension are not only the most experienced, but, as might be expected, among the wisest and most efficient of the teaching staff. In the face of this fact the inspection staff were asked to report as to the number of such teachers who could so retire on pension 'with advantage to the teaching service.' The inspection staff report that the schools would be well served by the retirement of 4 headmasters, 6 assistant masters and 2 assistant mistresses, all of whom are eligible for pension, and that such teachers could be replaced by qualified teachers at the minimum of the scale. The gross annual saving in salaries so effected would be 1752*l.* per annum; saving to rates 700*l.*" Neither Mr. Sadler nor Miss Dyson was included in the twelve teachers recommended for retirement in that report.

According to the usual routine, the report was considered by two sub-committees of the Education Committee before being presented to the latter Committee itself. Both sub-committees acquiesced, with very great reluctance, in the proposed methods of retrenchment embodied in the report, and stated that their acquiescence must be regarded as being given under duress. Finally the report came before the

Education Committee on February 26, 1923, and (after several amendments had been negatived) the report as originally submitted by Mr. Sharp was adopted.

In the meantime the report had been sent to the Board of Education, and the Minister of Education had written a letter, on February 21, 1923, to Sir William Clegg, the chairman of the Education Committee, in which he stated that while he recognized the difficulties under which the Education Committee was labouring owing to the great increase in the rates of Sheffield, he expressed his grave concern at the proposal to discontinue, possibly for two years, all the special instruction in manual and domestic subjects in the public elementary schools in that city, and he earnestly hoped that that proposal might receive most careful consideration with a view to its modification, if not its abandonment. Further, the Board of Education had on February 23, 1923, sent to the Education Committee a copy of the following question asked in the House of Commons by Lord Eustace Percy and of the answer given by the Minister of Education—namely, "Question, To ask the President of the Board of Education whether his attention has been called to the curtailment or suspension of arrangements for physical training and practical instruction in handicraft, cookery and other domestic subjects in public elementary schools which has already been effected or is now proposed by certain local education authorities for purposes of economy and what his attitude is in this matter?" Answer: "There can be no doubt that the provision made by local education authorities for the work is extremely valuable, if not essential, if the public elementary school is to serve its purpose of preparing children—particularly those whose bent is practical, rather than literary, and whose education ceases at the age of fourteen—for entry upon life. While I desire to leave local education authorities as much discretion as possible in their methods of making necessary economies, the wholesale discontinuance of provision for physical training and practical work in public elementary schools, particularly in large urban areas, is a step which I should feel bound very strongly to

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deprecate." It appeared from the minutes of the meeting of the Education Committee held on February 26 that the letter of February 21 from the Minister of Education to Sir William Clegg was not read to the Committee, but the question and answer in the House of Commons was read (though it did not prevent the Committee from adopting the report).

After the report had been adopted by the Education Committee, the Minister of Education requested an interview with the officials of the Corporation, and accordingly an interview was arranged for March 13, 1923, in London. On the day before this interview (namely, on March 12) the Minister of Education gave the following answer to a question asked by Major Yerburgh in the House of Commons—namely, "I think it is desirable in the interests of the schools that the capacity of teachers for rendering effective service should be carefully reviewed at the pensionable age of 60, and that their retention beyond that age should depend on the authority being satisfied that they are able to perform their duties efficiently and to do full justice to their pupils. But I do not think that undiscriminating retirement of teachers at the age of 60 is desirable." At that interview on March 13, 1923, which was held in the offices of the Board of Education in Whitehall, there were present the Minister of Education, the chairman of the Education Committee (Sir William Clegg), the chairman of the Finance Committee of the City Council, the Town Clerk and Mr. Sharp. Mr. Sharp was the only witness called who was present at the interview; and, according to his evidence of what took place thereat, the Minister, after having expressed his concern at the suggested suspension of instruction in domestic science and manual work, drew attention to the answer which he had given to the question asked by Major Yerburgh in the House of Commons on the previous night, and gave a strong hint that the Corporation of Sheffield should carry out its economies by getting rid of teachers eligible for pensions, rather than by suspending instruction in domestic science and manual work.

On the following day the City Council held its monthly meeting, at which one of the items of business was: "(4.) To consider and, if thought fit, to adopt an estimate upon which to make a city rate for the half-year ending 30th September, 1923." At that meeting the following resolution was passed: "That the report of the Finance Committee on the estimate for the city rate for the ensuing half-year, now presented and considered as read, be adopted, a copy thereof having been entered in the minutes of that Committee of the 6th March, 1923, and that having regard to the necessity for curtailing expenditure, so as to avoid increasing the rates of the city and with a view of interfering as little as possible with the work of the Education Committee, the council instructs the Education Committee to reconsider their estimates and, in particular, to consider the increase in the number of teachers whose engagements may be terminated, because of their eligibility for superannuation on reaching the age of 60 years and to decrease the number of manual instruction and cooking departments proposed to be closed under the scheme, on the understanding that the total call on the rates shall not exceed the 325,725*l.* voted to them by the Finance Consultative Committee." The effect of the termination by the Education Committee of the engagements of an increased number of teachers eligible for superannuation allowances would be to reduce the call on the rates, because under the School Teachers (Superannuation) Act, 1918, superannuation allowances were payable out of moneys provided by Parliament and not out of the rates. The place of each teacher whose engagement was determined would be filled by some other member of the teaching staff, and there would be a general move up, the ultimate vacancy on the staff being filled by the appointment of a new assistant teacher. Thus there would be a saving out of the rates in respect of each teacher whose engagement was terminated, of the difference between his or her salary, which would be high up in the scale, and the salary of the new assistant teacher, which would be at the bottom of the scale. In pursuance of that resolution of March 14, Mr. Sharp instructed the inspection staff to prepare

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lists of all the teachers (both at provided and non-provided schools) who had attained the age of 60 or who would attain that age during the then ensuing financial year, and to divide such teachers into two classes, the first class to consist of those who were of reasonable efficiency, and the second of those who were of less efficiency, and that, in making such classification, they were to have regard to the extent to which retardation obtained in the schools, to the general efficiency and tone of the schools, and to how the schools had acquitted themselves at the last merit examination. The inspection staff in the course of the same morning prepared three lists—first, a list of all teachers who were then 60 years of age and upwards or who would attain that age within the financial year 1923–4. That list contained 27 male head teachers (including Mr. Sadler), 15 female head teachers (including Miss Dyson), 13 male assistant teachers, and 16 female assistant teachers, making a total of 71 teachers; secondly, a list of such of the teachers comprised in list 1 as were "to be retained." This list contained 8 male head teachers, 5 female head teachers, 2 male assistant teachers and 10 female assistant teachers, making a total of 25 teachers; and thirdly, a list of such of the teachers comprised in list 1 as were "proposed to be retired." That list contained 19 male head teachers (including Mr. Sadler), 10 female head teachers (including Miss Dyson), 11 male assistant teachers and 6 female assistant teachers, making a total of 46 teachers. Those lists were submitted to Mr. Sharp, who, after consulting certain records in his office, finally approved them on Saturday, March 17, on which day they were typed for circulation. In the meantime, in view of the impending meeting of the City Council for the purpose of fixing the rate for the ensuing half-year, Mr. Sharp had on Friday, March 16, hastily summoned meetings of the School Management Sectional Sub-Committee and of the Elementary Education Sub-Committee, to be held on the afternoon of March 19, without stating in the notices convening those meetings the nature of the business to be transacted.

On Monday, March 19, the School Management Sectional

Sub-Committee met. Mr. Sharp attended that meeting and submitted the lists which had been prepared as above described for approval. He told the sub-committee that he had asked the inspection staff to go into the question of the efficiency of the teachers named in the lists and that they were to have regard to all the circumstances, but he did not inform the sub-committee of the detailed instructions which he had given to the inspection staff on which they were to act in preparing the lists. The names of the teachers to be dismissed were then read out, in order that members might ask any questions, if they so desired. No question was asked either as to Mr. Sadler or as to Miss Dyson; and the Sectional Sub-Committee resolved to make a report to the Elementary Education Sub-Committee recommending the dismissal of all the teachers contained in list 3 en bloc. There was no time after this meeting to reduce this report into writing and, accordingly, Mr. Sharp at the meeting of the Elementary Education Sub-Committee, which was held immediately after the close of the meeting of the School Management Sectional Sub-Committee, stated verbally what the Sectional Sub-Committee had done. The Elementary Education Sub-Committee approved of the action of the School Management Sectional Sub-Committee, and resolved to recommend the Education Committee to adopt it. The names of Mr. Sadler and Miss Dyson were not even mentioned at that meeting.

After those meetings Mr. Sharp drew up a written report of the School Management Sectional Sub-Committee. That report stated as follows: "The Director of Education reported that the City Council had considered the report of the Finance Advisory Sub-Committee indicating the directions in which the retrenchment of expenditure on education required by the Finance Consultative Committee of the City Council could be effected with the minimum damage to the educational system of the city. The City Council have agreed that for the financial year commencing April 1, 1923, the total sum proposed to be drawn from the local rates in respect of ordinary expenditure was 325,725*l.*, and instructs the Education Committee to reconsider their estimates and in

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particular"—the report then set out the rest of the resolution passed by the City Council on March 14, and proceeded: "The School Management Sectional Sub-Committee have, in accordance with the instructions of the City Council, reconsidered their estimates and have re-examined the cases of teachers who are now eligible or will during the financial year 1923–24 become eligible for retirement under the School Teachers (Superannuation) Act, 1918"—a statement which in the opinion of the Court was misleading, if not untrue, so far as the case of each of the plaintiffs was concerned—"and recommended: (*a*) that the engagements of the following teachers in council schools be terminated so as to effect their retirement on the dates respectively shown in the last column" (then there followed a list of 13 headmasters, 4 headmistresses, 7 assistant masters and 3 assistant mistresses, all of whom were teachers in provided schools); "(*b*) That the managers of non-provided schools be informed that the Education Committee has had under consideration on financial and on educational grounds the advisability of terminating the engagements of all teachers as they arrive at eligibility for pension under the School Teachers (Superannuation) Act, 1918: that the Education Committee has decided that on educational grounds discrimination shall be exercised in this connection: that it be a direction to the managers of non-provided schools (s. 29, sub-s. 2 (*a*), Education Act, 1921) in which the undernamed teachers are respectively employed that the engagements of these teachers be terminated—on educational grounds—as on the dates respectively set out hereunder." Then there followed a list of 4 headmasters (including Mr. Sadler), 4 headmistresses (including Miss Dyson), 2 assistant masters and 1 assistant mistress.

The Education Committee met on March 26 and confirmed the report of March 19 and the recommendations contained in it. At this meeting the following resolution was also passed: "That the director be requested to make arrangements for the continuance of the manual instruction and domestic training classes in connection with the elementary

schools as at present conducted, and that he be further requested to make such economies in other parts of the Committee's operation (if any) as may be necessary to provide for the cost." Immediately after this meeting Mr. Sharp sent two letters, both dated March 26, 1923, to the corresponding manager of St. Jude's (Moorfields) School and also two letters having the same date and mutatis mutandis in the same form to the corresponding manager of St. George's Girls' School. The first of those letters was as follows: "Dear Sir, I am to inform you that the City Council has had under consideration the estimates of expenditure and income for the coming financial year presented by the Education Committee. The City Council has referred these estimates to the Education Committee for reconsideration with certain indication of policy which it is the desire of the City Council that the Education Committee should adopt. Arising out of this policy, I am directed to set out below an extract from the minutes of the School Management and Elementary Education Sub-Committees and confirmed by the Education Committee on the 26th inst." There is then set out para. (*b*) of the report of March 19, 1923, and the letter proceeded: "I am therefore to inform the managers that the Education Committee will not be responsible for the salary of the teacher herein referred to "—that was to say Mr. Sadler in the one case and Miss Dyson in the other—" after the date mentioned as the date of the termination of his engagement. It is therefore imperative that the managers should communicate with the teachers concerned in such time as to effect a termination of the engagement on the date mentioned."

The second letter to the same manager was as follows: "Dear Sir, In supplement of my letter enclosed herewith I am to say that the educational grounds upon which the Education Committee base this direction under clause 29 (2.) (*a*) of the Education Act, 1921, is that, inasmuch as teachers to whom the resolution applies have reached the age of 60 years or will reach that age during the coming financial year and are eligible for superannuation, the educational interests of the schools can be and will be served by the retirement

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of these head teachers and by the appointment of younger head teachers."

Accompanying each set of letters was a notice to be signed by the corresponding managers and already countersigned by the Secretary for Education addressed to the head teachers concerned, terminating such teacher's engagement on the earliest possible date having regard to the terms of his or her agreement; and the notice wound up with the following sentence: "We are asked to convey to you an expression of appreciation of the services you have rendered and an expression of regret that the present circumstances of the city necessitate the taking of this course."

The managers both of St. Jude's (Moorfields) School and of St. George's Girls' School (after vainly endeavouring to get Mr. Sharp and the Education Committee to modify their determination to dismiss Mr. Sadler and Miss Dyson) declined to carry out the directions of the Education Committee on the ground that such direction was not given on educational grounds, as required by the Act, and on the ground that the schools concerned would suffer serious damage if they were to carry out such direction.

On April 10, 1923, there was a meeting of the School Management Sectional Sub-Committee, at which Mr. Sharp attended, and reported that the managers of St. Jude's (Moorfields) School and of St. George's Girls' School had failed to carry out the direction given to them by the Education Committee under s. 29, sub-s. 2 (*a*), of the Act; and thereupon the Sectional Sub-Committee passed a resolution recommending that in accordance with the provisions of that section the engagements of (amongst others) Mr. Sadler and Miss Dyson be terminated by the Education Committee.

At a meeting of the Elementary Education Sub-Committee held on April 16, 1923, that sub-committee resolved to report to the Education Committee that the foregoing recommendation of the Sectional Sub-Committee be approved and adopted.

On April 17, 1923, the Finance Advisory Sub-Committee held a meeting at which Mr. Sharp presented a report, dated April 11, 1923, containing his revised estimates of expenditure

and income for the year 1923–24. In this report Mr. Sharp, after dealing with the events which led to the necessity for making it, and after pointing out that the proposed reduction in the draft on the rates in respect of cookery and manual work amounting to 7298*l.* was eliminated, and after stating that the object of the report was to indicate the possibilities of replacing that form of reduction in the draft rates by some other form of reduction, states (inter alia): "The increase of the number of teachers to be retired on pension results in a reduction of gross expenditure of 4417*l.* and a reduction in draft from rates amounting to 1768*l.*," and the report winds up with the following statement: "I have searched very carefully indeed for proposals which would have enabled the Committee to effect the further reduction in the draft on the rates which would have been equivalent to that produced by the retirement of teachers on pension. I regret that I am unable to submit proposals to this end." The sub-committee on considering this report recommended that it be adopted, and that such steps be taken as might be necessary for effecting the retrenchment outlined therein.

On April 23, 1923, the Education Committee held a meeting at which the report of the Elementary Education Sub-Committee of April 16, 1923, was adopted and the recommendations contained in it were confirmed, after an amendment to the effect that so much of the report as provided for the termination of the employment of (amongst others) Mr. Sadler and Miss Dyson be not confirmed had been negatived. At the same meeting the report of the Finance Advisory Sub-Committee of April 17, 1923, was received and adopted and the recommendations contained in it were confirmed, after an amendment to the effect that so much of the report as relates to the further retirement of teachers on superannuation be not confirmed had been negatived.

Immediately after this meeting Mr. Sharp caused the following letter, dated April 23, 1923, to be written and sent to Mr. Sadler: "Dear Sir, The City of Sheffield Education

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Committee have forwarded a communication to the managers of the St. Jude's (Moorfields) School directing the managers to terminate your engagement as teacher in that school on educational grounds. The educational grounds on which this direction was based are, that the Committee are satisfied that by reason of your age you will not be able to perform your duties as efficiently as a younger head teacher or to do full justice to your pupils. The managers have failed to carry out this direction. I am instructed by the Education Committee, acting under s. 29, sub-s. 2 (*a*), of the Education Act, 1921—which provides that if the managers of a non-provided school fail to carry out such a direction, the local education authority shall, in addition to their other powers, have the powers themselves to carry out the direction in question as if they were the managers—to give you notice that your engagement as a teacher in the St. Jude's (Moorfields) School will terminate on May 31, 1923." On April 27, 1923, the managers of St. Jude's (Moorfields) School lodged an appeal to the Board of Education against the action of the local education authority in dismissing Mr. Sadler, and stated that they were satisfied that Mr. Sadler had fulfilled and was capable of fulfilling efficiently his duties as head teacher, and stated their belief that it was in the interests of the school that Mr. Sadler should be retained so long as he was in a position to serve the school as efficiently as he had done in the past or until the date arrived when his certificate expired. They contended that the education authority had shown no educational ground for the dismissal of Mr. Sadler, and that the educational authority were seeking to compass the dismissal of Mr. Sadler merely on the ground that he had attained the age of 60, or alternatively, for motives of economy.

On April 28, 1923, Mr. Sharp caused a letter in similar terms to the one sent to Mr. Sadler to be written and sent to Miss Dyson terminating her engagement on May 31, 1923.

On May 10 the managers of St. George's Girls' School lodged an appeal to the Board of Education on similar grounds to those mentioned in Mr. Sadler's appeal.

Both the appeals stood over pending the decision of the Court in the present actions, which were commenced on May 23, 1923, in which the plaintiffs sought to obtain declarations that the respective notices were invalid and inoperative and for relief by injunction.

At the trial Mr. John Henry Barker (one of the managers and treasurer of St. Jude's (Moorfields) School) and Canon Edward Purdon Blakeney (one of the managers and also chairman of the St. Matthias's Church of England School, another non-provided school in Sheffield of which Mr. Ibbotson was headmaster) gave evidence for the plaintiffs.

Mr. Barker (whose evidence was accepted by the Court) stated that, at an interview which he had with Mr. Sharp on March 27 or 28, 1923, on the subject of the proposed dismissal of Mr. Sadler, Mr. Sharp told him that the City council had insisted on a certain sum of money being saved and that he (Mr. Sharp) had "in order to cover himself" got some educational grounds for the dismissal of Mr. Sadler. Canon Blakeney (whose evidence also was accepted by the Court) stated that at an interview which he had with Mr. Sharp on March 23, 1923, in reference to the extension of Mr. Ibbotson's certificate, Mr. Sharp told him he could not entertain the suggested extension, because the Education Committee were obliged by the Sheffield Corporation to cut down their expenses and that, as they had failed with reference to the cookery department, they had to go to certain headmasters for the purpose of reducing the estimate for that year; Canon Blakeney then asked Mr. Sharp: "Then it has nothing to do with educational grounds?" to which Mr. Sharp replied: "Well, I must say 'on educational grounds' to protect myself."

At the trial the principal witness for the defendants was Mr. Sharp, whom the Court described as a capable, zealous and loyal servant of the Corporation; and in dealing with his evidence the Court stated as follows: "The conclusion at which I have arrived from his evidence as a whole is that Mr. Sharp, owing to the attitude taken up by the Board of Education and owing to the action of the City Council, knew

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that it was necessary to transfer a substantial part of the reduction in the estimates (which he had hoped would be effected by the suspension of instruction in domestic science and manual work) to the retirement of teachers eligible for pensions, and, that being so, he wished to effect such transfer with the minimum damage to the educational system of the city. He, therefore, collected such information and consulted such records as he found practicable in the limited time at his disposal, and, on the materials so obtained and with such personal knowledge as he had of the schools (which was necessarily somewhat superficial), he selected 38 out of the 70 teachers eligible for pensions as being, in his opinion, teachers of lesser efficiency than the rest of such teachers and recommended the dismissal of the teachers so selected. So far as the teachers at the provided schools were concerned this presented no difficulty, as their engagements could be terminated by the Education Committee without assigning any grounds. Mr. Sharp, however, was aware that, so far as the teachers at the non-provided schools were concerned, the Education Committee would under s. 29, sub-s. 2 (*a*), of the Act, have to assign educational grounds for their dismissal. From what the Minister of Education had said at the interview of March 13, Mr. Sharp seems to have formed the opinion that the instructions of the City Council, which were obviously given on purely financial grounds, could be carried out as regards the teachers at non-provided schools as well as regards teachers at provided schools, so long as he made some kind of discrimination between the teachers eligible for pensions. The conclusion at which I have arrived from his evidence is, that he thought that the requirements of s. 29, sub-s. 2 (*a*), were formalities which would be sufficiently complied with by the somewhat perfunctory method of selection adopted by him and that this selection could be vouched on 'educational grounds' if the action of the Education Committee were ever impeached.

"For financial reasons, Mr. Sharp considered himself compelled to recommend the dismissal of over one-half of the teachers eligible for pensions, and the teachers so to be

dismissed were selected by him, because, in his opinion, their dismissal would do the least harm to the educational system. I am convinced from the evidence, that at the time when Mr. Sharp recommended the retirement of the plaintiffs he never intended to brand them with the stigma of inefficiency, and that his evidence tending in that direction was given under the stress of having to support the action of the Education Committee."

Mr. Quine, the senior school inspector, also gave evidence, from which the Court came to the conclusion that he, to the best of his ability, assisted Mr. Sharp in his attempt to carry out the necessary economies with the least possible damage to the educational system.

Clauson K.C., *Ward Coldridge K.C.* and *A. A. Thomas* for the plaintiffs. The grounds upon which the notices of dismissal were based were not educational grounds within the meaning of s. 29, sub-s. 2 (*a*). (1) The question is whether the grounds upon which the notices were based were educational, economic or mixed grounds. The grounds here were clearly grounds of economy. The evidence shows that the Education Authority was forced by the Finance Committee to economise by dismissing a number of teachers over 60 years of age, including the two plaintiffs. The motive must

(1) Sect. 29, sub-s. 2, is as follows: "A local education authority shall maintain and keep efficient under this Act a public elementary school not provided by them only so long as the school is necessary and the following conditions and provisions are complied with: (*a*) the managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and with respect to arrangements for the admission to the school of teachers of secular subjects not attached to the staff of any particular school, and teachers appointed for the purpose of giving practical instruction, pupil teachers and student teachers, and for the dismissal of any teacher on educational grounds, and, if the managers fail to carry out any such direction, the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers; but no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours."

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be educational as distinct from religious or political or moral, so far as moral can be separated from educational, and as distinct from social: *Mitchell* v. *East Sussex County Council.* (1) In that case it was not challenged that the grounds were any other than educational grounds. In *Smith* v. *Macnally* (2) the ground of the dismissal was not the one expressed by the managers—namely, that they were not satisfied with the religious instruction given by the plaintiff, but it was that she had ceased to be a member of the Church of England, which was not one "connected with the giving of religious instruction." So here the ground given—namely, that of inefficiency—was not the real ground. The real ground was that of economy. It is not enough to state educational grounds when the real ground is something different. In *Martin* v. *Eccles Corporation* (3) the dismissal was stated to be on educational grounds, but the real ground was disobedience to a regulation which was not connected with education, and, therefore, there was no educational ground in fact; the notice there was held to be inoperative. In *Hanson* v. *Radcliffe Urban Council* (4) the dismissal was based on the ground that the teacher refused to accept a revision of her salary, which was held to be an economic and not an educational ground. A mere desire to economise on the part of the Education Authority does not entitle it to dismiss a teacher on educational grounds. It is not a question of the efficiency of the plaintiffs that is in issue, but whether they were dismissed on educational grounds.

Owen Thompson K.C. and *J. B. Lindon* for the defendants. The only grounds upon which the dismissals were based were educational. In the early part of 1923 the Education Authority was pressed to cut down the education estimates by 20,000*l.* The method adopted for that purpose was the dismissal of the less efficient of the teachers who were over 60 and the substitution of younger and more efficient teachers. That, it is submitted, is an educational ground. What was foremost in the minds of the Education Committee

(1) (1913) 109 L. T. 778, 780.
(2) [1912] 1 Ch. 816.
(3) [1919] 1 Ch. 387.
(4) [1922] 2 Ch. 490.

was by what means the necessary economies could be effected with a minimum of damage to the educational system. We do not dispute that the dismissals were the direct consequence of economic pressure, but none the less the grounds for the dismissals were educational; in other words, the grounds were educational, the result of economic pressure. True it is that the plaintiffs would not have been dismissed, had it not been for economic pressure; but this admission does not prevent the grounds on which the dismissals were based from being educational.

Clauson K.C. in reply. If the grounds of the dismissal were partly economic and partly educational, still they would not be educational grounds within the meaning of the sub-section: see *Reg.* v. *St. Pancras Vestry* (1), where it was held that the vestry had not used proper discretion, because they had taken into consideration some factors which they were not entitled to take. No member of the Education Committee could have really thought that the dismissal of either of the plaintiffs was recommended on the ground of inefficiency. The evidence showed clearly that they must have thought the dismissals were on grounds of economy. The necessity for curtailing the education estimates was the causa sine qua non: apart from that reason, the plaintiffs would never have been dismissed.

Cur. adv. vult.

1924, Jan. 23. P. O. LAWRENCE J. delivered a written judgment in which he stated the facts and dealt with the evidence of the witnesses at the trial as above set forth, and then proceeded as follows: I do not propose to deal with the evidence which has been given by Mr. Sharp and Mr. Quine, with a view to attempting to prove the inefficiency of the plaintiffs, as I am clearly of opinion that, in a case where there are educational grounds which are not merely colourable, and the local education authority bona fide decides to dismiss a teacher on those grounds, it is not the function of this Court to sit as a Court of Appeal from the decision of the local education

(1) 24 Q. B. D. 371.

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authority, and to determine whether the educational grounds were sufficient to warrant the dismissal: see *Mitchell* v. *East Sussex County Council.* (1)

I now come to the crucial question in the case—namely, what were the grounds upon which the Education Committee acted when requiring the dismissal of the plaintiffs and when subsequently itself dismissing them? Were the grounds, as the defendants allege, educational, or, as the plaintiffs allege, purely financial?

The following facts bearing directly on this question clearly emerge from the evidence. Sir William Clegg, as chairman at the vital meeting of the Education Committee held on March 26, stated quite plainly that the object of placing the further number of teachers (including the plaintiffs) on superannuation, was for the purpose of effecting the saving of part of the money which the Education Committee originally proposed to save by suspending instruction in domestic science and manual work, but which proposal had been rejected by the City Council. No new facts relating to the plaintiffs, or to their schools, had come to the knowledge of the Education Committee, since they had adopted the January report. The only fresh occurrence since that date was that financial considerations had cropped up which made it necessary to retire a far greater number of teachers eligible for pensions than the twelve who had been recommended for retirement in the January report. The Education Committee never had any facts or information relating to Mr. Sadler or Miss Dyson or to their respective schools before it upon which it could form any conclusion whether any and what educational grounds existed to justify their dismissal on educational grounds. The obvious conclusion, in my judgment, is that the Education Committee considered that the financial reasons stated by the chairman were of such a nature as to compel it to decide upon the dismissal of the plaintiffs and of the other teachers; and this fact explains why none of the members of the committee inquired what the educational grounds were upon which they were asked to vote

(1) 109 L. T. 778, 780.

for the plaintiffs' dismissal, and why they left it to Mr. Sharp to draw up the letters to the managers, and to insert in those letters such educational grounds as in his opinion might fit the occasion.

At the meeting of the Education Committee held on April 23, the giving of the notices of dismissal was treated as the natural consequence resulting from what had been determined at the previous meetings of that committee on March 26 and April 16. From the speeches admitted to have been made at the meeting of April 23, it is obvious that financial grounds were the only grounds upon which that meeting came to the conclusion that the notices should be given, and this accounts, in my opinion, for the fact that it was left entirely to Mr. Sharp to write the letters of dismissal to the plaintiffs, and to insert in them any educational grounds which might occur to him. As a matter of fact Mr. Sharp, in stating the educational grounds in those letters, adopted the language used by the Minister of Education in answer to Major Yerburgh in the House of Commons on March 12. Neither these nor any other educational grounds were mentioned by the Education committee in reference to the plaintiffs, or to any other teachers in non-provided schools, and the reasons actually inserted in the letters were entirely the outcome of Mr. Sharp's own ingenuity.

The true explanation of the proceedings of the Education Committee, in my judgment, is that the committee realized that, owing to financial pressure, it had no option but to dismiss 38 of the teachers eligible for pensions, and considered that, if and so far as it was necessary to comply with any formality in order to accomplish the dismissal of these teachers, Mr. Sharp could be relied upon to deal with the matter.

In the result, on a consideration of the whole of the evidence, I have arrived at the clear conclusion, and find as a fact, that the real and only grounds for the dismissal of the plaintiffs were financial grounds, and that the alleged educational grounds were merely colourable.

In these circumstances, I am of opinion that the case is covered by the decision of the Court of Appeal, affirming

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Russell J. in *Hanson* v. *Radcliffe Urban Council* (1), where it was held that a mere desire to economise is not an educational ground within the meaning of s. 29, sub-s. 2 (*a*).

I therefore hold that the notices given by Mr. Sharp on behalf of the Education Committee, purporting to determine the engagements of the plaintiffs, were invalid and inoperative.

This really concludes the case; but having regard to the forceful argument addressed to the Court by Mr. Owen Thompson, I propose to say a few words on the assumption that (contrary to my opinion) some bona fide educational grounds for the dismissal of the plaintiffs did exist. If that be so, then the most that can be said on behalf of the defendants is that the grounds for the dismissal were mixed grounds, compounded as to part of financial grounds and as to the rest of educational grounds. Even if that be the true view (and Mr. Owen Thompson did not seriously contend that he could put his case higher) I am still of opinion that the notices were bad. Under sub-s. 6 of s. 29 of the Education Act, 1921, the exclusive power of dismissing teachers in non-provided schools is vested in the managers. If this sub-section be read with sub-s. 2 (*a*) of the same section, the result is that the managers have the exclusive power of dismissal, subject only to this, that they must carry out any direction given by the local education authority for the dismissal of teachers on educational grounds. This, in my opinion, necessarily implies that the direction given by the education authority must be a direction given solely on educational grounds. Mixed financial and educational grounds, in my judgment, are not educational grounds within the meaning of sub-s. 2 (*a*). In my opinion it would not be right (even if it were possible) to attempt to resolve the mixed grounds into their component parts, and then to cast away the financial grounds so as to leave the educational grounds as the undiluted and sole grounds for the dismissal. It seems to me (on the assumption that I have made as to the existence, in fact, of some educational grounds) that here the financial grounds and educational grounds were inextricably mixed,

(1) [1922] 2 Ch. 490.

and must stand or fall together, all the more so, as, on the uncontradicted evidence, the Education Committee would never have attempted, but for the existence of urgent financial reasons, to exercise the powers conferred by sub-s. 2 (*a*) at all.

Another way of putting the same point is that sub-s. 2 (*a*) confers upon the local education authority a discretionary power to require the dismissal of a teacher in a non-provided school on educational grounds only, and, if the authority in exercising this discretionary power takes other grounds into account, the power is not well exercised.

The principle which, in my opinion, is applicable on this view of the case is thus stated by Lord Esher M.R. in *Reg.* v. *Vestry of St. Pancras* (1): "If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."

It is true that the facts there were distinguishable from the facts in the present case, inasmuch as the body exercising the discretion took a wrong view as to the scope of the discretion; but it is plain from the judgment of Lord Esher that he did not intend to confine the general proposition stated by him to the particular facts of that case.

Therefore, even if the grounds upon which the Education Committee purported to act included some educational grounds—which I have held not to be the fact—my decision that the notices were inoperative would still hold good.

In the result I propose to make a declaration in each action to the effect that the notice of dismissal served upon the plaintiff by the local education authority was invalid and inoperative, and to order the defendants to pay the costs of the action. There will be liberty to apply for an injunction and generally.

Solicitor for the plaintiffs: *Eric G. Floyd, for Bingley & Dyson, Sheffield.*

Solicitors for the Corporation: *Rollit, Sons & Compston, for William E. Hart, Town Clerk, Sheffield.*

(1) 24 Q. B. D. 371, 375. H. C. H.

C. A.
1924
March 12, 13.

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[1922. S. 1627.]

Action, Cause of—Combination to protect Trade Interests—Procurement of Withdrawal of Supplies—Legality of—Limits of Justification.

A trade union of retail newsagents advocated the policy of limiting the number of retail newspaper shops in a given area, and enforced that policy by procuring its members to withdraw their custom from any wholesale newsagent who supplied newspapers to a retailer opening a new shop without its permission. Certain newcomers in a district having opened shops without the union's permission and obtained supplies of newspapers from a wholesale newsagent R., the plaintiff, who was a customer of R., at the request of the union, of which he was a member, withdrew his custom from R. and transferred it to another wholesale newsagent W. The defendants, a committee representing the proprietors of the newspapers, who took the view that the union's policy was injurious to the interests of their trade, intervened at the request of R., and, in order to compel the plaintiff to return to R. as a customer, threatened to discontinue the supply of those newspapers which W. obtained directly from them, and also threatened to discontinue the supply of newspapers to S., a wholesale newsagent who supplied R. with others of his newspapers, unless S. ceased to supply W. with newspapers so long as W. supplied the plaintiff. The defendants did not before so doing inquire into the merits of the particular dispute between the plaintiff and R., or consider whether the application of the union's policy to the facts of that particular case was likely to be injurious to the proprietors' interests; but they, rightly or wrongly, bona fide believed that it would be injurious to them, and in acting as they did were not actuated by spite to the plaintiff or by any desire to injure him:—

Held, that even if the defendants' act in threatening to cut off W.'s supplies was prima facie unlawful and therefore required justification—a question on which the Court expressed no opinion—there was sufficient justification for it in the fact that they honestly believed that it would operate to protect their trade interests, and that it was unnecessary for them to show that it would in fact have that effect.

Judgment of Russell J. reported [1923] 2 Ch. 32 reversed.

APPEAL from a judgment of Russell J.

The following statement of the facts is taken from the learned judge's judgment:—

In this case the plaintiff, a retail newsagent, sues the defendants for an injunction in the following terms: "An injunction restraining the defendants or any or some of them in combination or otherwise from procuring or attempting

to procure a breach of contract between the plaintiff and Messrs. Watson & Son or from interfering or attempting to interfere with the right of the plaintiff to enter into or continue such contracts or contractual relations with Messrs. Watson & Son as he would or generally with his right to carry on his business as he would."

The relevant facts are as follows: For the purpose of distributing the daily morning newspapers of London to the public three classes discharge their respective duties. The publishers produce the newspapers and supply them to the wholesale newsagents; the wholesale newsagents in their turn supply them to the retail newsagents; and they in their turn supply them to the public, but the firm of Messrs. W. H. Smith & Son (who are wholesale newsagents on an extremely large scale and obtain their supplies direct from the newspaper offices) in addition to supplying retailers direct, supply also wholesale agents who in turn supply retailers.

The trade union of the retail newsagents is the National Federation of Retail Newsagents Booksellers and Stationers, divided into district councils and local branches. The wholesalers have their own Federation of Wholesale Newsagents. The interests of the publishers are looked after by a committee of the respective circulation managers of the London dailies, known as the Circulation Managers' Committee. The defendants are members of this committee, which is hereafter referred to as "the committee." The retail federation advocates a policy known as the distance limit policy, which may be described as a policy of preventing newcomers from opening shops for the retail sale of newspapers in any area where the supply of newspapers to the public is already sufficiently provided for. All the events which led up to this action took place in 1922. Early in 1922 cases arose of newcomers which the London district council of the retail federation considered came within the distance limit policy; that is to say, they were newcomers who commenced selling newspapers in an area already in the opinion of the London district council sufficiently equipped with retail newsagents.

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These newcomers, or some of them, were obtaining their supplies from a firm of wholesale newsagents called Ritchie Brothers of Shoe Lane. The London district council's secretary had failed to induce Ritchie's to stop supplies to these newcomers. On February 15 a special meeting of the branch presidents and secretaries of the London district was held, at which a resolution was carried, "that we ask one member from each branch to volunteer to withdraw his supplies from Ritchie on any of the ground he covers, and further action be taken to draw him into line with other wholesalers on the distance limit policy." The plaintiff is a retail newsagent with his shop in Hoxton. He is a member of the Shoreditch branch of the retail federation, of which a Mr. Badkin is the secretary. The plaintiff had for some time been a customer of Ritchie's (to the mutual satisfaction of both) for his supply of daily papers and periodicals. His Sunday papers he obtained from Messrs. Vickers in Angel Court, Strand. On the same February 15 a meeting was held of the Shoreditch branch, which the plaintiff attended. Mr. Badkin called for a volunteer, and the plaintiff responded to his branch's call, with the result that the plaintiff gave notice to Ritchie's to discontinue their supplies to him after Saturday, February 27. None of the newcomers who were being supplied by Ritchie's were within the area of the plaintiff's trade. At the same time the plaintiff cancelled his orders to Vickers. Since February 27 the plaintiff has been supplied with his papers (daily and Sunday) and periodicals by Watson & Son, wholesale agents of Dalston Lane. The plaintiff says that he went for his supplies to Watson's because they were more convenient to deal with than either Ritchie's or Vickers, being considerably nearer to the plaintiff's shop. He also says that in fact he gets slightly better terms from Watson's than he got from Ritchie's, and that he consequently would suffer damage by returning to Ritchie's, and he has no desire to do so. I am satisfied on the evidence that what finally decided the plaintiff to leave Ritchie's was the call for volunteers at his branch. Watson's obtained their supply of newspapers from W. H. Smith & Son, but

part of their supply of Daily Mails they obtained direct from the Daily Mail office. On March 2 Ritchie's wrote to the secretary of the committee asking them to take the matter up. On Saturday, March 11, the committee communicated by telephone with Watson's. Mr. Leslie Watson (manager of Watson's) was told that he must stop the plaintiff's supplies at once or else Watson's supplies would be stopped. This telephonic communication was apparently made as the result of a meeting of a sub-committee of the committee, held on March 10, at which (after the defendant Valentine Smith of the Daily Mail had explained the situation) the secretary was, according to the minutes, instructed to telephone Watson's, "to the effect that if they continue to supply Mr. Sorrell after to-morrow (Saturday), supplies will be stopped." On the same Saturday the defendant Valentine Smith telephoned to Messrs. W. H. Smith & Son. He stated that he had requested Watson's to stop the plaintiff's supplies, that Watson's had demurred, and that his object in ringing up was to get W. H. Smith & Son to bring pressure to bear on Watson's to stop the supply to the plaintiff. W. H. Smith & Son requested Mrs. Noyes (who owns the business of Watson's and is generally known as Miss Watson) to call and see them. She went on March 13. She requested the plaintiff to accompany her. He followed later accompanied by Mr. Badkin, but by the time they arrived Miss Watson had in fact left. An interview took place between Mr. Wilson, the town trade manager of W. H. Smith & Son, and Miss Watson. Mr. Wilson told her what had happened on the Saturday, and that it would be in her interest to stop the supplies of the plaintiff, as W. H. Smith & Son were threatened by the circulation managers that W. H. Smith & Son would have to stop Miss Watson's supplies if she did not stop supplies to the plaintiff. He also told her that the circulation managers were having a meeting that day, that they were going to let him know the result and what he was to do, and he advised her to abide by the decision of the circulation managers, which he would communicate to her. On the same morning the plaintiff and Mr. Badkin had an interview with

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Mr. Wilson and a Mr. Gottschalk. The plaintiff was told that they had trouble with the Daily Mail, that a serious message had reached them over the telephone, that unless he went back to Ritchie's there would probably be some trouble for him, and that W. H. Smith & Son might get their papers stopped. The plaintiff was strongly urged to go back to Ritchie's, not only for the sake of W. H. Smith & Son, but for the sake of his own business. On the same day a meeting of the committee was held at which the defendant Valentine Smith explained the position of affairs, and reported the telephonic communications with Watson's and W. H. Smith & Son. It was resolved to write to Ritchie's advising them to make complaint to Mr. Birrell, the secretary of the wholesalers' federation. This was done, and W. H. Smith & Son informed Miss Watson that she could carry on as usual. On March 15 Mr. Allen (a clerk in the town trade department of W. H. Smith & Son) saw the defendant Valentine Smith at his request. At that interview the defendant Valentine Smith stated that if Watson's did not stop supplying the plaintiff it would be a question of the supply to W. H. Smith & Son. In due course a letter of complaint, dated March 15, from Mr. Birrell reached the committee. On March 20 a meeting of the committee was held, at which it was resolved that a letter in terms agreed be sent to Watson & Son, and that a copy thereof be sent to Mr. Birrell requesting him to notify his members that Ritchie's would serve the plaintiff in future. At the same time the committee telephoned to Miss Watson that she was to stop the plaintiff's supplies after March 25. The letter in question was sent to Watson's. It was signed by the seventeen defendants to this action, and is in the following terms: "Confirming a telephone message this morning by a representative of the Chairman of the above Committee, it is unanimously decided that you should be requested to give Mr. Sorrell notice to discontinue supplying him with the under-mentioned daily newspapers after Saturday next 25th March." On March 24 Watson's wrote to the committee stating that they would discontinue the plaintiff's

supplies of daily newspapers after March 25. A question arose as to the plaintiff being entitled to a longer notice of discontinuance, and, on March 25, Watson's gave a notice of discontinuance of the plaintiff's supply of daily papers expiring on April 1. The writ in this action was issued on March 28, 1922.

Russell J. found as a fact that the defendants in stopping the plaintiff's supplies of papers had no intention to injure him personally, but he held that in combining to interfere, by means of threats, with the plaintiff's right to trade as he wished they had done an unlawful act, which was actionable, unless sufficient justification could be shown for it; and that, although they might have been able to justify their acts if they could have shown that they were done for the purpose of protecting the trade interests of the newspaper proprietors whom they represented, they could not make out any such justification in this case, as at the time when they did the acts complained of they did not even know the names of the newcomers who were alleged to have infringed the federation's distance limit policy, or where they had opened their shops, or whether the areas to which they had gone were already fully supplied, and had not made any inquiries into the merits of the particular cases, but acted simply for the purpose of establishing their claim against the federation of having the sole voice in deciding whether a particular area was sufficiently supplied. He accordingly granted the injunction prayed.

The defendants appealed.

Clauson K.C. and *Dighton Pollock* for the appellants. The judgment appealed from proceeds upon the grounds: First, that the defendants by bringing pressure to bear on Watson's to discontinue their supply of papers to the plaintiff were doing a prima facie unlawful act, which was actionable in the absence of sufficient justification; and secondly, that on the facts of the case there was no such justification. The judge's attention was mainly directed to the latter question, but unless the first proposition is established that question

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does not arise, and here there was nothing prima facie unlawful in what the defendants did. There was no suggestion of any procurement of breach of contract; nor had the defendants, when they combined to procure the withdrawal of the plaintiff's supplies, any desire to injure him. That is expressly so found. All that they wanted was to get him to conform to their views on the application of the distance limit policy. The only matter which was suggested to be illegal was that the defendants "combined to interfere with the plaintiff's right to trade as he willed by means of threats." But there is nothing unlawful in threatening to do a lawful act, and the acts which the defendants threatened to do were perfectly lawful. There is nothing unlawful in one person refusing to deal with another, or in his procuring third persons to refuse to do so, provided that the procurement is not brought about by unlawful means, such as threats of violence, or threats of intention to publish defamatory matter, or fraud. And it is not suggested that any of those unlawful means existed here. Secondly, even if the defendants' action here had been prima facie unlawful, there was ample justification for it. The dispute here is, as the judge below said, between the retailers' federation on the one side and the circulation managers on the other. The latter did precisely what the former did, and nothing more, and under those circumstances, even if there were anything open to objection in that action, the plaintiff could hardly be heard to complain. But there was in fact nothing objectionable in it. A. has a right to carry on his business as he thinks proper. B. has a similar right. If those two rights come into conflict, so that B. is damaged, no action will lie against A. for causing that damage, if in causing it he acted bona fide for the protection of his own interests. If indeed he caused it with intent to injure, in the sense of punishing B. for something entirely unconnected with the protection of his trade interests, as for instance if it were done to punish the plaintiff for the non-payment of a debt, as in *Giblan* v. *National Amalgamated Labourers' Union* (1), he cannot justify the action. However

(1) [1903] 2 K. B. 600.

that question does not arise here, it having been expressly found that there was no intention to injure. But the judge has held that in order to justify an otherwise unlawful act on the ground of protection or promotion of trade interest, the defendants must show that it is for their direct trade interest to do the act in question. The appellants contend that that view is wrong. It is not necessary to show that the act complained of in fact conduced to the protection of their interests, it is enough that they bona fide thought that it would do so, and there was no suggestion here that the defendants in doing what they did acted otherwise than bona fide with that object in view.

Sir John Simon K.C., *Maugham K.C.* and *Arthur Henderson* for the respondent. In order to justify their acts the defendants must at least show that they had reasonable grounds for thinking them to be beneficial to their trade interests. But there was no evidence that they had any grounds for so thinking, or that they in fact ever thought so. There is nothing to show that they really thought the action of the retailers' federation was hostile to them. No doubt the object of the circulation managers is to secure as large a sale of newspapers as possible. But if an unlimited number of retail newspaper vendors are to be allowed to set up business in a given area it may be that none of them will be able to make a living, that some of them will become bankrupt, and that the "returns" of the newspapers will be unduly large. Therefore the distance limit policy, so far from being in all cases to the disadvantage of the newspaper proprietors, may in some cases operate in their favour. Before they can say in any particular case that it will conflict with their interests they must inquire into the circumstances, and here they never did so. The only witness called by them was a Mr. Moseley, the representative of the Morning Post, and he knew nothing about the facts of the particular dispute, for the Morning Post is not a paper which has any sale in Hoxton. The conclusion to be drawn from his evidence was that the defendants did not object to the distance limit policy in principle but only when it victimized one of their members.

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If so, they cannot justify their action without inquiry. *Ware and De Freville* v. *Motor Trade Association* (1) is clearly distinguishable, for there the defendants had carefully investigated the nature and effect of the plaintiff's action. *Mogul Steamship Co.* v. *McGregor* (2) is also distinguishable, for there the acts of the defendants were done solely for the purpose of increasing their own trade; whereas here the defendants claimed a right to intervene whenever they found a particular wholesale dealer had been interfered with, apart from any consideration whether their own trade interests had been damaged.

BANKES L.J. This is an appeal from a judgment of Russell J. in an action brought by a retail newsagent against a number of persons, known as the circulation managers, who act as the representatives of the London daily newspapers, the claim in the action being for an injunction to restrain those gentlemen from interfering with the right of the plaintiff to obtain his supplies of newspapers from such wholesale newsagent as he thinks proper. The plaintiff's case was that the defendants in so interfering with him had committed an actionable wrong, which entitled him to the protection of the Court, and Russell J. accepted that view. Quite recently we had a case before us in this Court—*Ware and De Freville* v. *Motor Trade Association* (1)—in which the facts were very similar to those in the present case, and Russell J. in considering that case came to the conclusion that the actual decision was probably correct, but he thought that the members of the Court, of whom I was one, had given reasons for their decision which were at variance with certain decisions in the House of Lords, and so thinking he considered that he ought to follow the views that had been expressed in the House of Lords rather than those expressed in the Court of Appeal, hoping that the parties to this litigation may ultimately obtain from the highest tribunal a clear exposition of the law. In that hope I most cordially agree. As I have so recently, in *Ware and De Freville's Case* (1), stated my

(1) [1921] 3 K. B. 40. (2) [1892] A. C. 25.

view of the law on this subject I do not propose to go through the authorities again, but applying that view of the law to this case I come to the conclusion that the plaintiff has failed to prove that the defendants committed any actionable wrong, or that they did anything more than the law allowed them to do for the protection of the business interests of their principals.

The facts of this case have been so fully and clearly stated by the learned judge that I do not think it necessary to go over them again, and will content myself with referring to a few of the more material facts in order to make clear the ground on which I rest my judgment. In the London newspaper trade there are, for the purposes of this case, three sets of persons to be considered: first the newspaper proprietors and publishers, then the wholesale newsagents, and lastly the retail newsagents. The retailers have a trade union known as the National Federation of Retail Newsagents Booksellers and Stationers, while the newspaper proprietors' interests are represented, so far as this matter is concerned, by the defendants, the circulation managers. In order to protect their members from undue competition by persons starting new businesses the National Federation have established a policy, which they call the "distance limit policy," and by which they endeavour to render it impossible for a newcomer, without the federation's permission, to start a shop for the sale of newspapers within a certain distance from the existing shop of a member. That policy they seek to enforce by calling upon the wholesaler who supplies an unauthorized newcomer with newspapers to discontinue the supply, and in the event of his refusal by calling upon their members who happen to be customers of the wholesaler to withdraw their custom. That is what I may term, for convenience sake, though perhaps not very accurately, the protection policy. On the other hand, the circulation managers adopt what I may call the free trade policy—that is to say, they consider that as a general rule, and subject to any objections they may themselves take in particular cases, everybody should be entitled to start a retail newspaper shop wherever he pleases.

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These two rival policies at times necessarily come into conflict. The present dispute arises in this way. Mr. Sorrell, the plaintiff, was in the habit of getting his newspapers from a firm of wholesalers of the name of Ritchie, but Messrs. Ritchie were not prepared to accept the policy of the National Federation. They had commenced to supply papers to persons who were infringing the distance limit policy, so steps were taken to bring them into line. A meeting of the Federation was called, and volunteers were asked for to put the necessary pressure on Messrs. Ritchie by refusing to take their papers any longer from them unless they came into line. The plaintiff volunteered, and in the exercise of his undoubted right to do so he withdrew his custom from Messrs. Ritchie, and transferred it to another firm of wholesalers, Messrs. Watson, who were prepared to act in accordance with the wishes of the federation. Thereupon the circulation managers intervened, in order to protect what they considered their trade interests, and informed Messrs. Watson that if they continued to supply the plaintiff they (the circulation managers) would have to withdraw the supplies of newspapers from them, their object being to defeat the attempt of the federation to force their policy on Messrs. Ritchie. In that state of things the present action was brought, and Russell J. held that the plaintiff had established as a matter of law that the defendants had committed an actionable wrong. As I understand that this case is going to the House of Lords, and as I have already expressed my view upon the subject, I do not propose to say anything further on the question whether what the defendants did amounted prima facie to a wrongful act. On the assumption however that it did, so that it became necessary for the defendants to establish that they had what Bowen L.J. called "just cause or excuse" for their action, I think it is right that this Court should express its opinion whether they succeeded in establishing it. The learned judge held that they did not, but with all respect I think that he has taken too narrow a view of the matter. He decided this question upon the ground that there had been no investigation of the merits of the particular

dispute, or whether or not the withdrawal by the plaintiff of his custom from Messrs. Ritchie, or the action of the federation, would in fact injure the business of the defendants' principals. With submission that does not appear to me to be the true point of view from which to look at the matter. The defendants represented a body of traders, the newspaper proprietors; and it cannot be disputed that a body of traders are entitled to adopt a policy which they bona fide believe to be necessary to protect their trade interests, even if the effect of putting that policy into operation will be to interfere with the business of others. In my view, if it is legitimate to adopt a policy it is legitimate within certain limits to take the necessary aggressive action in defence of the policy. The action taken here was, in my opinion, a legitimate action in defence of a legitimate policy. Though the one witness called for the defendants may have proved himself an indifferent witness, he sufficiently established that the action of the circulation managers was taken for the purpose of defending a policy which they honestly believed was necessary in the interests of their employers—namely, that of maintaining freedom for retailers to set up business where and when they pleased. For these reasons I think that the appeal should be allowed.

WARRINGTON L.J. This case raises two questions, both of which the learned judge below decided in favour of the plaintiff. The first was whether the action of the defendants had given the plaintiff any cause of action at all, that is to say, whether it was prima facie unlawful so as to give the plaintiff any right to complain. The second was whether, assuming that it was prima facie unlawful, it could be justified as having been done in the interests of the defendants' trade. Upon the first question I express no opinion, as it has not been argued by the plaintiff's counsel. It was indeed raised in *Ware and De Freville's Case* (1) on similar facts and decided in favour of the defendants' contention, and though I refrain from expressing any opinion upon it here I must not be taken

(1) [1921] 3 K. B. 40.

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as in any way dissenting from the judgments delivered in that case. Upon the second question I think the learned judge has taken too narrow a view of what it is necessary for the defendant to prove in such a case as the present. In the *Mogul Case* (1) Bowen L.J. says this: "Then comes the question, Was it"—that is the act complained of—"done with or without just cause or excuse? If it was bona fide done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable." In the present case the act was done, as I think, bona fide in the exercise of the proprietors' trade, and because they thought it was in the interests of their trade that they should not have to submit to the control of the newspaper distribution by a body representing the retailers; but that if the distribution of the papers was to be controlled by anybody it should be controlled by themselves as the persons interested in the increase of the circulation. With all respect to the learned judge I think that the witness who was called on behalf of the defendants amply established that the action they took against the plaintiff was because he had acted as he did with the object of enforcing the federation's policy, to which policy the proprietors objected as being opposed to their interests. What the learned judge says is this (2): "The only conclusion which I must draw is that the only excuse or justification suggested for the acts of the committee is the desire on their part to have the final voice in each case as to the application of the distance limit policy. It is not that they object to the distance limit policy in principle, but they claim to decide whether or not it shall be applied." Then again he says: "The committee claim the right of imposing their opinion, and object to the federation imposing their opinion as to how many retailers there should be." And finally he ends this part of his judgment as follows: "They acted simply for the purpose of establishing their claim as against the federation of having the sole voice in distance limit questions." Now supposing

(1) 23 Q. B. D. 598, 618. (2) [1923] 2 Ch. 49, 51.

those were the facts—for myself, having read the evidence, I do not think that they quite represent what was in the minds of the circulation managers—but supposing that they do, it seems to me that the right conclusion to draw is that the defendants were bona fide acting in what they conceived to be the true interests of their trade. I think therefore that even if there was a prima facie illegality in the acts of the defendants, they were nevertheless done with "just cause or excuse," and consequently the plaintiff has no ground of action. I agree that the appeal should be allowed.

SCRUTTON L.J. I agree that this appeal should be allowed. The learned judge states the ground of his judgment shortly thus (1): "In this case I hold upon the evidence that the defendants combined to interfere with the plaintiff's right to trade as he willed by means of threats; and I hold upon the authority of *Quinn* v. *Leathem* (2) that unless sufficient justification exists that is actionable if it results, or would result, in damage to the plaintiff." He then goes on to consider whether sufficient justification exists. If I disagree with him, as I do, on the question whether sufficient justification exists, it is unnecessary to go further and examine the first two stages of the process by which he arrives at his conclusion. Now whether sufficient justification exists depends upon what was happening, and what was happening was this. The retail newsagents have a federation which looks after their interests, and that federation takes the not unnatural view that the fewer retailers there are the better for those who are left. They say: "We do not want our retail shops to be too near one another, and desire to prevent new shops being opened within a certain distance of an old established shop, and the way in which we propose to prevent that is by warning the wholesalers that if they supply papers to the new shops the old shops will withdraw their custom from them." In pursuance of that policy, called the "distance limit policy," which they are perfectly entitled to maintain, and on the merits of which I express no opinion,

(1) [1923] 2 Ch. 49, 51. (2) [1901] A. C. 495.

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the federation, finding that certain new shops were being supplied by a firm of wholesalers named Ritchie, called for volunteers to withdraw their custom from Messrs. Ritchie. The plaintiff volunteered, and withdrew his custom accordingly.

When we had got to this stage it occurred to me to turn to the plaintiff's statement of claim and to wonder whether the plaintiff himself did not "wrongfully and maliciously interfere or attempt to interfere with the right" of Messrs. Ritchie "to enter into or continue such contracts or contractual relations" with the new shops "and generally to interfere or attempt to interfere with the rights" of Messrs. Ritchie "to carry on their business as they would." Accordingly I asked Mr. Maugham, who appeared for the plaintiff, whether the plaintiff's action was illegal, and he admitted that it was; indeed he could hardly do otherwise, as the plaintiff was doing exactly the same thing that he now complains of in the defendants. Now just as the retailers' federation had a policy for the protection of their interests, so the newspaper proprietors had a counter-policy, which they also were perfectly entitled to maintain. Their view was that any restriction of the number of shops at which newspapers could be sold was to their disadvantage, and accordingly, if they found retailers endeavouring to impose such a restriction by threatening to withdraw their custom from the wholesalers who supplied the new shops, and to transfer it to other wholesalers, their policy was to threaten in their turn to withdraw supplies from the wholesalers to whom the retailers' custom was transferred. It seems to me clear on the facts that each side was taking the action which it believed to be right in defence of its trade. Having got so far I turn to the judgment of Bowen L.J. in *Mogul Steamship Co.* v. *McGregor* (1), in my opinion one of the finest judgments that he ever delivered, and I find him saying this: "This seems to assume that . . . . there is some natural standard of fairness or reasonableness (to be determined by the internal consciousness of judges and juries) beyond which

(1) 23 Q. B. D. 598, 615, 616, 617, 618.

competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason for such a proposition. It would impose a novel fetter upon trade. . . . . If there is no such fetter upon the use of property known to the English law, why should there be any such a fetter upon trade? . . . . If it was bona fide done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable." Accepting that statement of the law I think it is not for me to say whether the retailers' federation were unreasonable in the action which they took, or whether the circulation managers were unreasonable in the action with which they answered it. The only question is, Did each of the two parties act honestly in the defence of their respective trades? I think they did, and the action of both was therefore legal.

This renders it unnecessary for me to express any opinion on the other part of the case, on which I have already, in *Ware and De Freville's Case* (1), made such remarks as occurred to me to be useful, and I only wish to add this, that when this case gets to the higher tribunal I hope their Lordships will consider the memorandum signed by Lord Dunedin and Mr. Arthur Cohen in the Report of the Royal Commission on Trade Disputes and Trade Combination in 1906 discussing the exact effect and limits of *Allen* v. *Flood.* (2) That memorandum, and particularly the passages on pp. 29 and 30, seems to me to be of the highest importance in this case, and, though not legally binding as an authority, is such that the tribunal which is called upon to settle the matter finally should weigh the arguments therein put forward before proceeding to do so.

Appeal allowed.

Solicitors for the appellants: *Lewis & Lewis.*
Solicitors for the respondent: *Shaen, Roscoe, Massey & Co.*

(1) [1921] 3 K. B. 40. (2) [1898] A. C. 1.

J. F. C.

C. A.
1924
Jan. 14, 15, 16, 17, 30.

In re TWOPENY'S SETTLEMENT.

MONRO *v.* TWOPENY.

[1923. T. 1129.]

Settlement—Conversion—Personalty into Realty—Strict Settlement of Freeholds —Funds directed to be held upon Trusts and in manner applicable as if they had arisen from Sale of Freeholds under Settled Land Act, 1882—*Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *s.* 21 ; *s.* 22, *sub-ss.* 2, 5.

By a settlement dated October 18, 1882, certain freehold property over which E. T. and E. M. T. had a joint power of appointment, subject to certain interests subsisting under an earlier settlement, and certain freehold property belonging to E. T. solely for his absolute use were brought into strict settlement, and by the same settlement certain funds and securities which were subject to the same joint power of appointment and certain funds and securities belonging to E. T. were settled " upon the trusts and in the manner in which the same would be held and applicable if they had arisen from a sale of the said hereditaments and premises hereinbefore granted and settled by E. T. alone under the powers of the Settled Land Act, 1882." On October 12, 1901, S. E. T., the first tenant in tail, died intestate. On his death C. D. T. as tenant for life entered into possession of the settled securities and continued in such possession and receipt of income until his death on January 6, 1923. On a summons taken out by the trustees to have it determined whether the funds and investments remaining subject to the trusts of the settlement now formed part of the estate of S. E. T. :—

Held (affirming the decision of Romer J.), that what the settlor had done was to define the duty of the trustees by reference to the Settled Land Act, 1882, and thus to make it optional to them to invest either in personal securities or in land, with the result that the settlement did not impose a paramount obligation on the trustees to invest the funds in real estate which was essential to conversion. There being no such direction it was incompetent to the settlor, not having the powers of Parliament, to effect conversion by incorporating s. 22, sub-s. 5, of the Settled Land Act, 1882.

Held, therefore, that the funds formed part of the estate of S. E. T., the first tenant in tail under the settlement, and were payable to his legal personal representative.

In re Walker [1908] 2 Ch. 705 approved and followed.

APPEAL from the decision of Romer J.

By an indenture of resettlement dated Oct. 18, 1882, and made between Edward Twopeny of the first part Edward Maxwell Twopeny of the second part and the Rev. Charles Inglewood Parkin and Sydney John Wilson of the third part

certain freehold estates consisting of the Woodstock Park Estate and other hereditaments in Kent which had been disentailed by a deed executed previously on the same day were granted to the parties thereto of the third part to hold to the use of Edward Twopeny for his life with remainder to such uses as Edward Twopeny and Edward Maxwell Twopeny should jointly appoint and in default of any and subject to every such appointment to Edward Maxwell Twopeny for life with remainders over in strict settlement to the use of the heirs of his body in tail with remainder to the use of Charles Dynely Twopeny for his life with remainder to his issue in tail with remainder to the use of Richard Ernest Nowell Twopeny for life with remainder to the use of his first and other sons successively in tail male with remainder to the use of Edward Nowell Twopeny during his life with remainder to the use of his first and other sons successively in tail with an ultimate remainder in fee to the use of Edward Maxwell Twopeny. The deed contained the usual power of jointuring and charging portions. The settlors further directed and appointed that certain stocks shares and securities to a nominal value of about 33,000*l.* should be transferred to or vested in the trustees of the settlement and after the same had been transferred to or otherwise legally vested in them should be held and applied "Upon the trusts and in the manner upon which the same respectively would be held and applicable if they had arisen from a sale of the said hereditaments and premises hereinbefore granted and settled by the said Edward Twopeny alone under the powers conferred by the Settled Land Act, 1882." The settlement concluded with an investment clause with a power to vary investments with the consent of the tenant for life for the time being and a power to appoint new trustees, and incidental trustees' powers.

Edward Twopeny died on June 18, 1887, and Edward Maxwell Twopeny thereupon became entitled in possession during his life to the rents and profits of the settled hereditaments and premises and to the income of the several sums of stock.

Edward Maxwell Twopeny died on September 24, 1898,

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having had issue one child only, Sydney Edward Twopeny, who thereupon became entitled to the rents, profits and income.

Sydney Edward Twopeny, who was born on July 26, 1884, died at the age of seventeen years on October 12, 1901, leaving his mother Dora Nesbitt formerly Twopeny his next of kin, to whom on January 13, 1902, letters of administration to his estate were granted. Dora Nesbitt had since married, and was now the wife of Trevor Martin Middleton Nesbitt.

Upon the death of Sydney Edward Twopeny Charles Dynely Twopeny entered into possession of the settled securities, and continued in such possession and receipt of income until his death on January 6, 1923.

This originating summons was taken out by the present trustees to have it determined whether the funds and investments remaining subject to the trusts of the settlement on its true construction formed part of the estate of Sydney Edward Twopeny deceased as the first tenant in tail or whether they still remained and ought to be held by the trustees as capital money.

Romer J. held, following the decision of Parker J. in *In re Walker* (1), by which he considered himself bound, that the words of the settlement did not impose an imperative trust on the trustees requiring them to invest the funds in real estate, and therefore there was no conversion in equity. The funds accordingly formed part of the estate of Sydney Edward Twopeny, the first tenant in tail under the settlement, and were payable to Dora Nesbitt as his legal personal representative.

Edward Nowell Twopeny, the present tenant for life, appealed. The appeal was heard on January 14, 15, 16 and 17, 1924.

Clauson K.C. and *J. E. Harman* for the appellant. The device adopted in this settlement is entitled to succeed. The direction that the personalty fund is to be held as capital money arising under the Settled Land Act, 1882, is sufficient

(1) [1908] 2 Ch. 705.

to convert the fund into real estate for all purposes. That device was held to be ineffective in *In re Walker* (1), and Romer J. in the present case held himself bound by the decision of Parker J. in that case. It is submitted that *In re Walker* (1) was wrongly decided. We rely upon the doctrine established by the authorities that where the quality of real estate is imperatively and definitively fixed upon personalty (or vice versa) equity will treat the personalty or realty (as the case may be) as having acquired the quality indicated, even though it is not found to have been actually turned into realty or personalty; because equity treats what ought to have been done as done and will not allow the rights of beneficiaries to be altered by failure on the part of trustees to carry out their trust. The words of the settlement in this case importing into it the provisions of the Settled Land Act, 1882, are sufficient to create an imperative and definitive trust for conversion of the personalty fund into realty.

[The following sections of the Settled Land Act, 1882, were particularly referred to: ss. 3, 4, 6, 20, 21, 22, 24, 33, 37, 50 and 51.]

If the clause in the settlement had run that the investments should be held in trust to realize and invest in the purchase of freehold land to be conveyed to the uses declared by the settlement the personalty would have been held to be converted into realty. The whole effect of the clause as it stands is that the personalty is to be applied in the purchase of freeholds or leaseholds, or left temporarily uninvested. Leaseholds are to be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers and provisions to on and subject to which freehold land is under the provisions of the Act to be conveyed. It is submitted that there is in this case a clear indication of an intention that there shall be a conversion into realty.

In *Fletcher* v. *Ashburner* (2) Sir Thomas Sewell said that

(1) [1908] 2 Ch. 705. (2) (1779) 1 Bro. C. C. 497, 499.

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"nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land." That was cited to and approved by Lord Alvanley (then Master of the Rolls sitting for the Lord Chancellor) in *Wheldale* v. *Partridge.* (1)

The intention may be gathered from the whole of the deed. The limitations here are all appropriate to real estate. See also *Johnson* v. *Arnold* (2); *Earlom* v. *Saunders* (3); *Cowley* v. *Hartstonge* (4); *Thornton* v. *Hawley* (5); *Hereford* v. *Ravenhill* (6); and *Cookson* v. *Cookson.* (7) The last of the cases is relied upon, not for the actual decision but for the opinions of the noble Lords on the doctrine of conversion. The Court regards the dominant intention of the parties and endeavours to give effect to it so far as possible having regard to the fictitious nature of the doctrine. Here the intention was manifestly to keep the fund and the land together.

Evans v. *Ball* (8) again is cited not for the decision itself, but for the opinions therein expressed. The ultimate intention of the testator in that case was as clear as possible that the fund should be converted into realty.

The cases show that the Court will (1.) ascertain the real intention of the parties, and (2.) strain the language of the instrument to carry it out.

In re Walker (9) has been followed or applied in *In re*

(1) (1800) 5 Ves. 388, 396; on rehearing before Lord Eldon L.C. (1803) 8 Ves. 227, 235, 236.
(2) (1748) 1 Ves. Sen. 169.
(3) (1754) 1 Amb. 241.
(4) (1813) 1 Dow, 361.
(5) (1804) 10 Ves. 129.
(6) (1842) 5 Beav. 51.
(7) (1845) 12 Cl. & F. 121.
(8) (1882) 47 L. T. 165.
(9) [1908] 2 Ch. 705.

Aspinall's Settled Estates (1); *In re Bogg* (2); and *In re Sturt.* (3)

In re Goswell's Trusts (4) is only referred to in order to show that it has not been overlooked.

Atwell v. *Atwell* (5) shows that to get over the consequence of conversion into personalty there must be an obligation that there should be a reinvestment in land.

Here the provisions of the Settled Land Act, 1882, must be read into the settlement, and so reading them it is clear from s. 4, sub-ss. 2, 3, that the primary intention is that the fund shall be reinvested in land. That intention is not overridden by the fact that there may be an investment in leaseholds.

[WARRINGTON L.J. You are asking us to give to the provisions of the Act a meaning which is impossible. See s. 21.]

The primary intention of the settlors here is that the trustees should invest in realty. The other alternative investments are merely subsidiary. Here the fund is to be held in trust for the beneficiaries according to interests declared in terms applicable to real estate. We ask the Court to hold that the primary intention is that the fund should be converted into realty, because in no other way can the trusts be fully carried out. A sufficient intention to convert into realty has been shown. As a matter of construction the clause which reads the statute into the settlement has the effect suggested on behalf of the appellant.

It is admitted that if *In re Walker* (6) was rightly decided the contention of the appellant must fail.

Hughes K.C. and *R. H. Hodge* for the respondent Dora Nesbitt. The decision appealed against is sound. *In re Walker* (6) was rightly decided. There is here no imperative direction to invest the fund in freehold land, as is necessary to constitute conversion: *Walker* v. *Denne.* (7)

(1) [1916] 1 Ch. 15.
(2) [1917] 2 Ch. 239.
(3) [1922] 1 Ch. 416, 421.
(4) [1915] 2 Ch. 106.
(5) (1871) L. R. 13 Eq. 23.
(6) [1908] 2 Ch. 705.
(7) (1793) 2 Ves. Jun. 170.

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In the old precedents care was always taken to create an imperative trust for reconversion. The incorporation of the provisions of the Settled Land Act, 1882, as to the investment of capital moneys arising under the Act cannot be treated as an imperative direction that the fund shall be converted into realty. The Act allows various forms of investment and an investment in real estate is not even the first.

J. E. Harman in reply referred to Settled Land Act, 1882, s. 22, sub-s. 5, and Lewin on Trusts, 12th ed., pp. 1220, 1221.

Cur. adv. vult.

Jan. 30. The following written judgments were delivered:—

POLLOCK M.R. This is an appeal from a judgment of Romer J. dated October 31, 1922, upon an originating summons taken out to decide the effect of a settlement made on October 18, 1882, upon certain funds, part of the estate of Sydney Edward Twopeny, and the question shortly put is whether certain stocks, funds, shares, moneys and securities newly brought into that settlement, as well as those previously settled, are to be treated as subject to, and to follow the trusts relating to real estate by reason that it was expressed in the settlement that they were to be held and applied "upon the trusts and in the manner upon and in which the same respectively would be held and applicable if they had arisen from a sale of the said hereditaments and premises hereinbefore granted and settled by the said Edward Twopeny alone, under the powers conferred by the Settled Land Act, 1882."

It is to be observed that at the date of the settlement the Settled Land Act had received the Royal Assent on August 10, 1882, but by s. 1, sub-s. 2, its operation was deferred to a subsequent date, namely January 1, 1883. It is admitted by counsel for the appellant that the words above quoted are —if not quite verbatim the same—at any rate indistinguishable in their effect from the words which were considered by Parker J. in *In re Walker*. (1) The learned judge,

(1) [1908] 2 Ch. 705.

Romer J., felt himself bound by the decision in *In re Walker* (1), and gave judgment accordingly. This appeal is brought avowedly to test the decision of Parker J. in *In re Walker*. (1) Further, it is not unimportant to mention that in 1916 Neville J. agreed with, and applied the decision in, *In re Walker*. (1) See *In re Aspinall's Settled Estates*. (2) Thus the decision of *In re Walker* (1) has for a number of years remained undoubted.

The case for the appellant was ably and exhaustively argued before this Court by Mr. Clauson, who cited the earlier cases as well as the later, which, in sequence, establish and confirm the doctrine that where the quality of real estate is "imperatively and definitively"—see *Walker* v. *Denne* (3)—fixed upon personalty (or vice versa) equity will treat the personalty (or realty as the case may be) as having acquired the quality indicated, even though it is not found to have been actually turned into realty or personalty; because equity treats what ought to be done as done, and will not allow the rights of beneficiaries to be altered by a failure on the part of trustees to carry out their trust. The words quoted above—"imperatively and definitively"—must be found appropriate to describe the effect of the instrument; for, to continue the quotation, if the question is left "ad arbitrium whether it is to be considered as land or money," the doctrine of conversion will not be applied: see per Lord Loughborough. (4)

It is clear that as the Settled Land Act was not in operation at the date of the settlement the words used cannot do more than import into the settlement the appropriate sections of the Act: the authority of the law of the land cannot be invoked for them. They derive their force from the settlement, and that is contractual and no higher. Sect. 22, sub-s. 5, of the Act, if appropriate to the circumstances of the present case, is of no force per se. The settlor cannot by reference to an Act attach to the settlement the powers of the Act, and the very presence of sub-s. 5 in the Act connotes

(1) [1908] 2 Ch. 705.
(2) [1916] 1 Ch. 15.
(3) 2 Ves. Jun. 170.
(4) 2 Ves. Jun. 184, 185.

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that statutory power was necessary to effect the conversion therein provided for. The question is, therefore, whether the words used in the settlement do create an imperative and definitive trust. No doubt there are a number of authorities which establish that the trust may be collected from the instrument. The Court may look at the object of a settlor or testator and the whole instructions given by the instrument itself to ascertain the meaning of the terms used. See *Earlom* v. *Saunders* (1); *Cowley* v. *Hartstonge* (2); *Cookson* v. *Cookson*. (3)

Mr. Clauson argues that in accordance with this principle there is expressed sufficiently in the terms of the settlement that there is to be a conversion into realty. Sect. 21 of the Act empowers the investment of capital moneys to be made in accordance with a varied table. By sub-s. (i.) all securities on which the trustees of a settlement are by the settlement, or by law, authorized to invest trust money of the settlement, and by sub-s. (vii.) leaseholds with not less than sixty years to run are comprised in the table. If, therefore, s. 21 of the Act is written into the settlement it by no means follows that an investment in realty would be chosen by the trustees. It cannot be predicated that trustees with such powers would have felt themselves definitively and imperatively bound to invest in realty, for under s. 22, sub-s. 2, an investment shall be made according to the direction of the tenant for life and, in default thereof, according to the discretion of the trustees. "But in the last-mentioned case, subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement."

The uncertainty thus introduced by ss. 21 and 22 is answered by Mr. Clauson by saying that the wide powers given thereunder must be deemed to be cut down so as to conform to the intention of the settlor, which is to be collected from the whole of, and circumscribed by the indications appearing in, the settlement. *Thornton* v. *Hawley* (4) was

(1) 1 Amb. 241.
(2) 1 Dow, 361.
(3) 12 Cl. & F. 121.
(4) 10 Ves. 129.

cited. In that case there was a direction in a settlement with all convenient speed, after request, to lay out money in land, and it was held, although no request had been made, that the general intention was clear, and effect was given to that general intention rather than to a strict observance of the terms used.

It was argued that in the present case the limitations were clear and appropriate to real estate: and as Lord Selborne said in *Evans* v. *Ball* (1) the cases of *Earlom* v. *Saunders* (2) and *Cowley* v. *Hartstonge* (3) show that limitations appropriate to real estate may be important evidence in construing the instrument, and "may justify some apparent violence being done to the words of option in order to give effect to the general intent." Lord Selborne points out that the principle thus invoked is not exclusively applicable to cases of this particular kind, and he adds that it is one to be always applied with great discrimination and caution. *Evans* v. *Ball* (4) clearly illustrates the caution that must be used in ascertaining an intention from inference, and Lord Watson points out that the intention to be discovered is not what one may think "might have been his (the testator's) intention had he been thoroughly aware of the legal effect of the language he was using, but the intention which he has actually expressed, as that intention is to be collected from the whole terms of the will."

It is not easy to reconcile the process suggested, and necessary, to arrive at the true effect of the settlement with the doctrine that the quality of realty must be "definitively" fixed. That word seems inapt, when it is difficult to determine what powers are introduced from the Act into the settlement, and a question must arise, when they are so introduced, as to how far some and which of them are to be cut down or modified.

These observations illustrate the difficulty of declaring that there is to be found in the settlement under consideration what it is essential should be found, if the doctrine of

(1) 47 L. T. 165, 167.
(2) 1 Amb. 241.
(3) 1 Dow, 361.
(4) 47 L. T. 165, 170.

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conversion is to be applied. The judgments of Parker J. in *In re Walker* (1) and of Romer J. in the present case appear to me to be right, and the appeal must be dismissed. The costs will be dealt with as in the Court below.

WARRINGTON L.J. The question in this case is whether certain stocks, funds and securities settled by a deed of family settlement dated October 18, 1882, were effectually converted into land so as to become subject to the same limitations as those upon which certain hereditaments comprised in the same settlement were thereby settled.

The learned judge in the Court below, regarding himself as bound by, and therefore following, the decision of Parker J. in *In re Walker* (1), has decided that the funds in question were not converted into land. The appellant asks us to reverse that decision and to overrule the decision of Parker J. and that of Neville J. in *In re Aspinall's Settled Estates* (2), which followed *In re Walker.* (1)

The form of words adopted by the settlor in *In re Walker* (1) and in the present case was practically the same, namely: "The trustees shall hold and apply the funds upon the trusts and in the manner upon and in which the same would be held and applicable if they had arisen from a sale of the settled hereditaments under the powers conferred by the Settled Land Act, 1882." I have purposely omitted certain words descriptive of the "settled hereditaments." They are quite immaterial for the present purpose.

The doctrine that in equity land may be converted into money and money into land at the will of a settlor depends upon the principle that a Court of equity will not permit the default of a trustee to perform a duty imposed upon him to affect the nature of the interests conferred upon the beneficiaries, and therefore treats as actually done that which ought to have been done. Accordingly, if money is directed to be invested in the purchase of land to be settled upon certain uses that money, though not actually so invested, will devolve according to the provisions of the settlement

(1) [1908] 2 Ch. 705. (2) [1916] 1 Ch. 15.

exactly as the land would have devolved had it been purchased therewith.

It is obvious that, having regard to the principle upon which the doctrine of conversion is founded, there must be a paramount obligation binding the trustees to invest in the purchase of land, and therefore if such investment is optional only, so that the trustees may completely perform their duty by investing in some form of personal security, there would be no conversion, and the rights of the parties would depend on the actual nature of the property at the material time.

But the paramount nature of the trustees' obligation if imposed by the settlor is not affected by a mere power either to retain the original fund or to invest it in personal securities pending the purchase of land; the funds so retained or the investments made therewith retain the character of land impressed thereon by the obligation imposed on the trustees.

Cases have arisen in which a direction to invest in land or in personal securities, though apparently conferring an option on the trustees, has, on the construction of the entire instrument, been held to confer a power to invest in personal securities by way of interim investment only, and such construction has been adopted in order to give effect to an intention appearing on the face of the instrument that the settled money shall go along with settled land. The cases, however, do not affect the main principle that in order to effect conversion it is essential that the paramount duty in question be imposed on the trustees. This last matter is discussed and explained in *Evans* v. *Ball* (1) in the House of Lords. I desire particularly to refer to the passage in the speech of Lord Selborne L.C. commencing near the bottom of p. 166 and ending in the middle of the second column on p. 167.

One further point is clear, that a settlor cannot by merely directing that money shall devolve as land or be subject to limitations imposed upon land effect a conversion. (As to this see per Lord Selborne L.C. in *Evans* v. *Ball.* (2)

(1) 47 L. T. 165.

(2) 47 L. T. 165, 167.

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I have not thought it necessary to cite the cases in support of the several propositions I have ventured to state ; I do not think their accuracy is really in dispute.

The question, then, is whether on the true construction of this settlement there was imposed on the trustees a paramount duty to invest in land to be settled to the same uses as the settled land, or whether on the other hand the trustees could perform their duty by investing either in land or in personal securities.

The duty of the trustees is to hold and apply the funds as if they had arisen from a sale of the settled hereditaments under the powers conferred by the Settled Land Act, 1882. If they had so arisen, they would have been capital money arising under the Act, and the investment or other application thereof would be regulated by ss. 21 and 22 of the Act. I will read the material parts of these sections. By s. 21 : " Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes, (namely) : (i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement." Then there are further investments which I need not specify. Then follow certain provisions which may be considered as directing the application of the investment, and then follows sub-s. (vii.) : " In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land." Then there are certain other special provisions which I need not further mention. Sect. 22, sub-s. 1, provides this : " Capital money arising under this Act shall, in order to its being invested or applied as

aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly." Sub-s. 2 is as follows: "The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees." Then comes sub-s. 5, which is a very important sub-section: "Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement." Sect. 24 contains provisions as to the mode in which the land, when purchased, may be settled. That I need not read.

Now, on the true construction of these sections, there can, in my opinion, be no doubt that whether the investment be in personal securities or in land it is intended to be the definite investment of the money, and the personal securities cannot be regarded as a mere interim investment. This, in my opinion, is made quite clear by s. 22, sub-s. 5, the provisions of which would have been unnecessary if it were the paramount duty to invest in land and nothing else. But it was competent to Parliament to enact, and it has enacted in effect, that capital money arising under the Act and the investments thereof shall "for all purposes of disposition, transmission, and devolution, be considered as land"; in other words, that conversion shall be effected notwithstanding the absence of the paramount duty above referred to. What the settlor has done here is to define the duty of the trustees by reference to the Act and thus to make it optional on them to invest either in personal securities or in land, with the result that the settlement does not contain the direction which is essential to conversion. There being

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no such direction, it was incompetent to him as a settlor, not having the powers of Parliament, to effect conversion by incorporating s. 22, sub-s. 5, of the Act.

The result is that, in my opinion, the judgment of Parker J. in *In re Walker* (1) and that of Romer J. in the present case were both correct, and this appeal must be dismissed.

I may add with regard to the judgment in *In re Walker* (1) that I have not referred to the power given by the Act to invest in leaseholds and the specific directions as to the form of settlement in such case, for the reason that with all respect to the learned judge the direction to invest in personal securities affords a clearer and simpler ground for the opinion at which I have arrived.

SARGANT L.J. This action raises a question of some general importance—namely, whether in an ordinary strict settlement of real estate a clause directing that certain personal property consisting of investments was to be held "Upon the trusts and in the manner upon and in which the same respectively would be held and applicable if they had arisen from a sale of the said hereditaments . . . . under the powers conferred by the Settled Land Act, 1882," effected an equitable conversion of the personal property into real estate. Romer J., following with some indications of approval a decision of Parker J. in *In re Walker* (1), has held that the clause did not effect such a conversion, and accordingly that a reversionary interest in the property (which had remained as originally invested) devolved as personal estate. On the present appeal we are invited to overrule the decision of Parker J. and a subsequent decision to the like effect of Neville J. in *In re Aspinall's Settled Estates.* (2)

The main principles of law on the subject of equitable conversion have been well settled for a century and a half or more, and in more recent times have been clearly and authoritatively stated in the highest tribunal in the important

(1) [1908] 2 Ch. 705. (2) [1916] 1 Ch. 15.

case of *Evans* v. *Ball.* (1) The course of devolution on intestacy of any property or any interest in property, whether such property or interest be legal or merely beneficial, is one of its fundamental incidents, is governed by the general law of the land, and cannot be altered at the will of the owner by any mere declaration or contract. But an individual may by means of a will or settlement subject property of one kind, such, for example, as money, to a trust under which it is to be invested in another kind of property such as land and create beneficial interests in the land so to be purchased. And in such a case, so long as the trust is enforceable and notwithstanding that the investment in land has not in fact taken place, beneficial interests in the money corresponding with those sought to be created in the land will devolve as if the trust had been executed, and they had actually become interests in land. The result is founded on the principle that equity treats the trustee as having done that which he ought to have done, and does not let his failure affect the rights of the intended beneficiaries. And it is to be noted that this result in no way conflicts with the general juridical principle of devolution, which has previously been stated, since the effect of the trust if carried out would have been to create new beneficial interests not in money but in land, and those beneficial interests would necessarily have devolved according to the rules relating to the devolution of land. A corresponding result, of course, takes place under trusts for the sale of land and for the settlement of the proceeds as personalty; but it is unnecessary to refer further to this analogous case.

But in order that an equitable conversion of money into land may be effected, it is necessary that the trust for conversion should be definitive and imperative. It will not do, for instance, if the trust is permissive only, or if there is an alternative to invest either in real estate or in leaseholds: *Walker* v. *Denne.* (2) On the other hand, if the alternative trust is to invest in personal estate or leaseholds merely as an interim investment, or is a clearly subsidiary trust or power

(1) 47 L. T. 165. (2) 2 Ves. Jun. 170.

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such as that ordinarily found in the old forms of powers of sale and exchange to invest in leaseholds convenient to be held with the settled real estate (see Davidson's Common Forms in Conveyancing, 1846, at p. 172), there is still a prevailing or paramount trust to invest in real estate, and equitable conversion is effected. And declarations or indications of intention in the will or settlement in question, though, of course, ineffectual as above stated for the purpose of altering the devolution of a beneficial interest when once the nature of that interest has been ascertained, may be of assistance in determining in doubtful cases whether the trust for investment in land is imperative or not, and consequently what the nature of the beneficial interest is: *Earlom* v. *Saunders* (1); *Cowley* v. *Hartstonge* (2), as discussed in *Evans* v. *Ball.* (3)

I come now to apply these general principles to the settlement in this case. Mr. Clauson, in his able argument for the appellants, has not contended that the effect of the clause in question was to actually constitute the personal property "Capital money arising under" the Settled Land Act, 1882. This construction would necessarily have determined the issue in favour of his client, since it would have brought into play automatically the provisions of s. 22, sub-s. 5, of the Act. But it seems inconsistent with the language of the phrase "arising under this Act" and with the definition section in the Act. And accordingly I think that Mr. Clauson was right in declining to press this construction, and in saying that the clause in question must be construed as if expanded by writing into it the provisions of the Act as to capital money.

Now, when this process is gone through, there is introduced into the settlement a direction that the personal property comprised therein is to be applied "wholly in one, or partly in one and partly in another or others" of a number of modes mentioned in s. 21 of the Act. And it is to be noted that the first of these modes is investment in ordinary

(1) 1 Amb. 241. (2) 1 Dow, 361.
(3) 47 L. T. 165.

personal property; that the choice of one or more of the alternative modes of investment is with the tenant for life under s. 22, sub-s. 2; and that, so far from these investments of capital money being treated as interim investments only, the indications in the Act, and particularly in sub-ss. 2 and 5 of s. 22, are in the contrary direction. And it is notorious that one of the main objects and results of the Settled Land Acts has throughout been to relieve embarrassed landowners by enabling them to substitute for their settled land some more lucrative and less onerous form of investment. It seems to me, therefore, that the clause in question, when amplified by the introduction of the provisions of the Settled Land Act, 1882, as to capital money arising under the Act results in creating not a definitive or imperative trust for investment in land, but a trust for investment at the option of the tenant for life in a number of alternative ways of which real estate is not even the first.

Great stress has been laid by Mr. Clauson on the provisions of s. 22, sub-s. 5, of the Act. He says that the referential introduction into the settlement of this sub-section indicates a clear intention on the part of the settlors that the personal property in question was to be treated and devolve as real estate. I agree with him that this was the intention. But for the reasons given in the earlier part of this judgment, I am of opinion that this indication of intention has no effect. It cannot, of course, operate directly on the personal property settled by the clause, since the settlors cannot, like Parliament, attach to personal property or any interests therein a new and special course of devolution. And its only operation must be by way of explaining words which are otherwise ambiguous, and showing that the document on its true construction does create an imperative trust for investment in land. But in my judgment there is no ambiguity here; the words of the statute clearly create an alternative trust for investment in personal property, and this alternative is in no way subsidiary to that for investment in land. This power on the part of the tenant for life to direct an application of capital money in ordinary investments seems to me more

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decisive for the present purpose than the subsequent power to choose leaseholds as a further alternative, though I am far from saying that this power by itself was not sufficient to justify the decision in *In re Walker.* (1)

Appeal dismissed.

Solicitors for appellant: *Metcalfe, Hussey & Hulbert.*
Solicitor for respondent: *W. Ivanhoe Thomas.*

W. I. C.

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In re CULLUM.

MERCER *v.* FLOOD.

[1922. C. 1224.]

Will—Construction—Testatrix Illegitimate—Trust in Favour of Son's Nominatim of her "brother"—Ultimate Trust in Favour of her own right Heirs—Failure of all previous Trusts—Brother Illegitimate—Claim by Daughters of Brother not Valid—Bona vacantia.

A testatrix demised an estate to the use of G. M. G. for life, and from and after his death to the use of his sons successively in tail male, with remainder to the use of R. H. F., the second son of her "brother" W. H. F., for life, with remainder to the use of his sons in tail male, with remainder to the use of W. H. F. the younger, the third son of her "brother" W. H. F. for life, with remainder to the use of his sons in tail male, and in default of such issue to the use of her "own right heirs for ever." The testatrix died in 1875, a widow and without issue. On the death of G. M. G. in 1921, all the prior limitations having failed, the estate was claimed by the daughters of W. H. F. under the ultimate limitation. The testatrix and W. H. F. were the illegitimate children of J. F. There was no evidence to show whether they were the children of the same mother:—

Held, that the claimants did not take under the ultimate limitation in the will, and that the estate or the proceeds thereof passed to the Crown as bona vacantia.

In re Wood [1902] 2 Ch. 542 distinguished.

BY her will, dated May, 1873, the testatrix, Dame Anne Cullum, demised the Hardwicke estate in the county of Suffolk, to which she had become absolutely entitled under

(1) [1908] 2 Ch. 705.

the will of her late husband, to the use of George Gery Milner Gibson and his assigns for life, and from and after his death to the use of his first and other sons successively according to their respective seniorities in tail male, with remainder to the use of Robert Hanford Flood, therein described as the second son of her "brother William Hanford Flood," for life, with remainder to the use of his first and every other son according to their respective seniorities in tail male, with remainder to the use of William Hanford Flood the younger, therein described as the third son of her "brother William Hanford Flood," for life, with remainder to the use of his first and other sons successively according to seniority in tail male, and in default of such issue to the use of her "own right heirs for ever." The testatrix died in 1875, without leaving issue. Robert Hanford Flood and William Hanford Flood the younger died in the lifetime of G. G. M. Gibson without leaving issue. On the death of G. G. M. Gibson, also without leaving issue, in 1921, doubts arose as to whether the testatrix had left any "right heirs," and if not, whether the property or the proceeds of sale thereof went to the Crown as bona vacantia, and this summons was taken out to determine the question. An inquiry was subsequently directed as to the legitimacy or otherwise of the testatrix and her "brother," William Hanford Flood. From this inquiry it was ascertained that one John Flood and his wife, Sarah, some years subsequent to their marriage in 1811, adopted two children, known as William Lloyd and Anne Lloyd. These children were brought up as members of the Lloyd family, and were treated with equal kindness by John Flood and his wife, but all inquiries failed to discover their actual parentage. In 1825 William Lloyd was entered as a pensioner at Trinity College, Cambridge, and in the entry in the books he was described as "William Lloyd," his father's Christian name being given as "William," and his native place Portarlington, Queen's County. In 1832 Anne Lloyd married Sir Thomas Gery Cullum, and John Flood and his sister, Elizabeth Flood, were present at the ceremony, and signed the register. John Flood, by his will, made shortly

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after the marriage of Anne Lloyd, gave several benefits to "William Lloyd, Esquire," and "Dame Anne Cullum." John Flood died in 1838, and shortly after his death William Lloyd petitioned for the grant of a licence for him to take and bear the name and arms of Flood. In support of his petition he alleged that he had inherited several estates under the will of John Flood, and that Elizabeth Flood had by deed settled other estates upon him, and that they had both expressed the desire that he should take and bear the name and arms of Flood. This petition was granted, and he assumed the name of Flood, and was known as William Lloyd Flood. In 1847 he married a Miss Hanford, and in 1861 he took the name of Hanford, and from then, until his death in 1892, he was known as William Hanford Flood. By his will, made in 1882, he referred to John Flood as "my late father, John Flood" and to Mrs. Flood as "the late Mrs. Sarah Flood." There was also evidence to show that he had referred in conversation to John Flood as his "father." On this evidence his Lordship held that the defendants had failed to discharge the onus that lay upon them of proving that William Hanford Flood was the heir at law of Dame Anne Cullum. He thought on the contrary that the evidence tended rather to the conclusion that William Hanford Flood and Dame Anne Cullum were the illegitimate children of John Flood. Under these circumstances the summons came on for hearing, the plaintiffs being the trustees of the will of the testatrix. Three of the defendants, who claimed the property, were the daughters of William Hanford Flood. The legal personal representative of William Hanford Flood and a lineal descendant of Sir Thomas Cullum were also defendants.

Leeke for the plaintiffs.

Hughes K.C. and *Ashworth James* for the legal personal representative and daughters of William Hanford Flood. The daughters of W. H. Flood can take under the ultimate trust in the will: *Owen* v. *Gibbons*. (1) Here there is

(1) [1902] 1 Ch. 636.

sufficient indication in the will that the testatrix regarded W. H. Flood as her brother, and intended his children to take. That, and the fact that under the circumstances no legitimate heirs could take, is sufficient to take the case out of the ordinary rule: see the judgment of Lord Cairns in *Hill* v. *Crook*. (1) The case most closely in point to the present one is that of *In re Wood* (2), and it was there held that the share of an illegitimate daughter passed to her next of kin. The testatrix must have meant to include some one other than her strict heir, as it is clear on the face of the will that she intended that some persons should be capable of taking. In *In re Deakin* (3) it was held, in order to give effect to the will, that the children and grandchildren of the natural brothers and sisters of a donee of a power to appoint among her relations took under her will. In *In re Jodrell* (4) the testator left his residuary estate to his relatives hereinbefore named, and it was held that under that gift illegitimate cousins of the testator took. Here the testatrix has named W. H. Flood as her brother. The testatrix having named W. H. Flood as her brother, it must be presumed that she meant that he was related to her legitimately: *Smith* v. *Tebbitt*. (5)

Manning K.C. and *Dighton Pollock* for the Attorney-General. It is clear that the daughters of W. H. Flood, who are not legitimate heirs of the testatrix, cannot take under the ultimate trust. The law attaches more sanctity to the word "heir" than it does to the word "children," and it must be interpreted strictly: see Jarman on Wills, 6th ed., 1552. Sir William Grant M.R. deals in *Cholmondeley* v. *Clinton* (6) with the difficulty of diverting technical words from their appropriate meaning. The Court ought not to extend that principle in the way sought for here. This case is quite different from *In re Wood* (2) and the other cases that have been cited. In each of those the testator or testatrix

(1) (1873) L. R. 6 H. L. 265, 282.
(2) [1902] 2 Ch. 542.
(3) [1894] 3 Ch. 565.
(4) (1890) 44 Ch. D. 590; on appeal sub nom. *Seale-Hayne* v. *Jodrell* [1891] A. C. 304.
(5) (1867) L. R. 1 P. & M. 354.
(6) (1817) 2 Mer. 171, 348.

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knew of the illegitimacy. Here there is nothing to show that the testatrix knew that her brother and herself were illegitimate. The ultimate trust fails, and the land or the proceeds of sale thereof go to the Crown as bona vacantia: *In re Bond.* (1)

Errington for the lineal descendant of Sir Thomas Cullum.

Cur. adv. vult.

Dec. 21. ROMER J. Assuming that William Hanford Flood was the illegitimate son of John Flood, the claiming defendants still claim to be entitled by virtue of the ultimate trust in Lady Cullum's will, and for this reason. They say that for the purpose of construing the ultimate devise by Lady Cullum in favour of her own right heirs, William Hanford Flood must be treated as being what she herself describes him as being—namely, her brother. Now the words "children" and "brother" and other words indicating relationship, when used in a will, refer prima facie to a relationship traced through a legitimate tie. There are, however, numerous authorities to be found in the books, so well known that I need not refer to them by name, in which a testator has shown in his will with sufficient clearness that by such a word as "children" or other words denoting relationship, he means to indicate or include persons claiming through other than a legitimate tie. If in the present case Lady Cullum knew that William Hanford Flood was her illegitimate brother, it is clear that she has used the word "brother" in other than its prima facie meaning. It would, however, be wrong to assume from this fact alone that she used the technical words "right heirs" in other than their prima facie meaning. If a testator were to describe an illegitimate brother as his "brother" it would be drawing a wholly false inference from that fact alone to assume that by the word "children" he intended to indicate or inculde illegitimate children, or that by such words as "next of kin" or "heir at law" he intended to include persons claiming through an illegitimate tie. I do

(1) [1901] 1 Ch. 15.

not think that this was really disputed by the daughters of William Hanford Flood. But they say that they are not relying only upon the fact that Lady Cullum describes William Hanford Flood as her brother, and they put their case in this way. Lady Cullum (they say) must have intended somebody to take under the limitation to her own right heirs, and inasmuch as, being illegitimate and a childless widow, she knew that no one could take under that limitation if the words "right heirs" received their usual meaning, she necessarily intended to indicate that, for the purpose of ascertaining such right heirs, William Hanford Flood is to be treated as her legitimate brother. In support of this contention the decision of the Court of Appeal in *In re Wood* (1) was strongly relied on.

In that case the testator bequeathed a pecuniary legacy to each of seven persons, whom he therein described as his children, by name, and he directed his trustees to stand possessed of his residuary estate after the death of his wife in trust in equal shares for such of his seven children as were thereinbefore named, and he directed his trustees to retain the legacy and share of his residuary trust estate which any daughter of his might take under the provisions therein before contained, and to hold the same upon trust to pay the income of each such daughter's legacy and share to her during her life for her separate use, and from and after her death in case she should leave a husband surviving her to pay the income to the husband for life or any less period if she should so direct or appoint, and, subject thereto, in trust for her children as therein mentioned. The will then continued as follows: "And if there shall be no such child, then in trust for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of intestates in case she had died possessed thereof without having been married, such persons taking as tenants in common in the shares in which they would have taken under such statutes." It appeared that three of the testator's children—two daughters

(1) [1902] 2 Ch. 542.

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and a son—were borne by his wife to him before her marriage. One of the illegitimate daughters died without having had any issue and without having exercised her power of appointment in favour of her husband. The testator's widow having died, the question arose as to whether the legacy and share of residue of this illegitimate daughter devolved upon her death without issue upon the persons who would have been her next of kin at the time of her death, in case she and the other persons described in the will as the testator's children had all been legitimate or what other persons became entitled thereto. It was held by the Court of Appeal, consisting of Vaughan Williams, Romer and Stirling L.JJ., that the share, in the events that had happened, passed to those who would have been the daughter's next of kin if she and the testator's other children had all been legitimate. Vaughan Williams L.J. concurred in this decision with very great hesitation, considering that such a decision involved the making of a distinct step in advance of any that had theretofore been made. Romer L.J., however, after reading the trusts declared by the testator in default of children of a daughter, expressed himself as follows (1): "Now, to my mind it is clear upon this will that the testator intended that some persons should be capable of taking under that gift over. The question is, what persons? Clearly it could not have been intended to provide in that gift over for any persons who could be ascertained under the statute treating his daughter as illegitimate, because on that footing there could have been no persons capable of taking. On that footing no meaning could have been attached to the gift over. I will not refuse to say that the testator had a meaning in this gift over. I think that he had a meaning, and I ask myself, what meaning? If he did not mean that this daughter should be treated as illegitimate, has he sufficiently shewn by his will, having regard to the circumstances of his family, what he intended by this gift over? When I ask myself this question, can I doubt who were the persons that he intended to take? No human being can have the slightest

(1) [1902] 2 Ch. 548.

doubt what the testator intended; and here I am able to give effect to that intention, and I therefore resolve to do so. The meaning is obvious. He has shewn throughout his will that he intended to treat all his children as legitimate. Then, can I carry out that which the testator intended should be carried out? There can be no question that the gift over is intended to take effect. It is certain that it can take effect if construed on the footing that the seven children were legitimate. On that footing the whole difficulty disappears." Stirling L.J. in the course of his judgment made the following observations (1): "The testator . . . . speaks of all these seven persons as his children, and he treats all of them as on the same footing. It follows from that that in the estimation of the testator they have kindred, that they are akin to the testator and akin to one another." Then, after referring to the words of the Statute of Distributions, he continues as follows (2): "In ascertaining who are the next of kindred mentioned in the statute the question is, who are meant by the testator? Because the testator has simply adopted this reference to the statute as a means of expressing his own dispositions. Are the illegitimate daughters to be treated as having no kindred—no persons who under the statute could succeed to their personal estate? It is plain in the view of the testator that on the death of an illegitimate daughter there might be persons who could succeed and would succeed to her estate. He treats all his children as akin to another; and, in my opinion, the persons intended to take are the next of kin, not on the footing that the illegitimate children are of kin to nobody, but on the footing that they are of kin to those described by the testator as their brothers and sisters." This case, at first sight, does no doubt seem to afford some justification for the contention of the claiming defendants in this case. There appear to me, however, to be at least three important differences between the case that I have to decide and the case of *In re Wood*. (3) In the first place, in order to apply *In re Wood* (3) I should

(1) [1902] 2 Ch. 549. (2) [1902] 2 Ch. 550.
(3) [1902] 2 Ch. 542.

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have to come to the conclusion that Lady Cullum knew of her own illegitimacy. Of this however I can find no evidence at all, however probable it may appear that she knew all that was known of the matter to William Hanford Flood. The testator in *In re Wood* (1) of course knew all the relevant facts. In the second place, the testator in that case had indicated very strongly by his will his intention to treat all his children, whether legitimate or illegitimate, in precisely the same way, and this intention would have been frustrated unless the illegitimate children were treated as legitimate for the purpose of ascertaining their next of kin. In the present case there is no indication of the intentions of the testatrix beyond that afforded by the fact of her making a devise to her right heirs and by the fact of her calling William Hanford Flood her brother. In the last place, there was in the case cited no difficulty in stating the hypothesis upon which the next of kin had to be ascertained. It was that the three children born before the marriage of the testator and his wife were born in wedlock. But in the present case I do not know upon what hypothesis I am to proceed. If it be the hypothesis that the parents of Lady Cullum and William Hanford Lloyd were married before the date of the birth of Lady Cullum I should have then to inquire whether William Hanford Flood was the eldest or only son of this union, and as to that nothing whatsoever is known. It cannot indeed be predicated with certainty that Lady Cullum and William Hanford Flood were born of the same mother. If they were not, should I not then have to ascertain whether John Flood had an illegitimate son by the mother of Lady Cullum even though younger than William Hanford Flood? In order to hold that William Hanford Flood took under the ultimate limitation in Lady Cullum's will, I should, as it seems to me, have to treat him as being her eldest legitimate brother of the whole blood. I cannot however find in her will sufficient warrant for doing this, even if I am justified in holding that, for the purpose of ascertaining her heir at law, I must treat him as being a legitimate brother. I have not lost sight of

(1) [1902] 2 Ch. 542.

the fact that in answer to the advertisements directed by the master the only claim made is that made by persons deriving title through William Hanford Flood. But the advertisements were not such as to suggest that any person claiming a quasi heirship through an illegitimate tie was invited to put in a claim, and I cannot assume from the fact that no such claim has been made by any person other than the claiming defendants that no such person exists.

In these circumstances, I feel constrained to decide against the claiming defendants and to declare that in the events that have happened the moneys and investments pass to the Crown as bona vacantia: see *In re Bond.* (1) I do so with regret, as I do not doubt that had Lady Cullum known all the facts and the difficulties that these facts give rise to, the ultimate disposition of her property would have been expressed in other words.

Solicitors: *Collyer-Bristow & Co., for Partridge & Wilson, Bury St. Edmunds; Williams & James; The Treasury Solicitor.*

(1) [1901] 1 Ch. 15.

P. J. B.

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Feb. 15, 19, 20; *March* 12.

In re WINGET, LIMITED.

BURN *v.* THE COMPANY.

[1923. W. 1461.]

Revenue—Corporation Profits Tax—"Assessed tax"—Preferential Payment—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 107, 209—*Finance Act*, 1920 (10 & 11 *Geo.* 5, *c.* 18), *s.* 56—*R. S. C., Order* LV., *r.* 69.

Corporation Profits Tax is an "assessed tax," within the meaning of s. 209 of the Companies (Consolidation) Act, 1908, which the receiver on behalf of the holders of debentures issued by the company is bound to pay forthwith out of the assets coming into his hands, and in priority to principal and interest in respect of the debentures.

ADJOURNED SUMMONS.

The point for decision in this case was whether the Crown was a preferential creditor under ss. 107 and 209 of the Companies (Consolidation) Act, 1908, in respect of a sum of 492*l.* 14*s.*, being the amount of corporation profits tax assessed against the company in October, 1922, for an accounting period of twelve months ending March 31, 1921.

By an order of April 27, 1923, the Court appointed a receiver, on behalf of the holders of first mortgage debentures issued by the company, of the undertaking of the company and all its property except uncalled capital. By s. 107 the receiver is bound to pay forthwith out of the assets coming to his hands, and in priority to principal and interest in respect of the debentures, the debts which in a winding up are, under s. 209, to be paid in priority to all other debts. The debts specified in s. 209 include "all assessed taxes, land tax property or income tax assessed on the company" up to the fifth day of April next before the relevant date (which in this case was April 27, 1923), and not exceeding in the whole one year's assessment.

Corporation profits tax was first imposed by the Finance Act, 1920. Sect. 52 enacts that there shall be charged, levied and paid on all profits as therein mentioned a duty of an amount equal to 5 per cent. of those profits. Sect. 53 provides for the determination of the profits, and s. 54 for

the determination of the accounting period. Sect. 56, sub-ss. 1–5, runs as follows: (1.) "Corporation profits tax shall be assessed by the Commissioners of Inland Revenue and shall be payable on the expiration of two months from the date on which it is assessed." (2.) "Where a company on whose profits the tax is to be assessed is a British company, the tax shall be assessed on the company, and where the company on whose profits the tax is to be assessed is a foreign company the tax shall be assessed on the company in the name of any agent, manager, factor, or other representative of the company." (3.) "Where a company is in the course of being wound up, the liquidator, receiver or other person having the control of the assets of the company shall not distribute the same until provision has been made to the satisfaction of the Commissioners of Inland Revenue for the payment of any corporation profits tax for which the company may be liable. Any liquidator, receiver or such other person as aforesaid who distributes the assets of the company without making such provision as aforesaid shall be liable to a fine not exceeding three times the amount of any corporation profits tax which may be payable." (4.) "An assessment (including an additional assessment) may be made by the Commissioners of Inland Revenue at any time within three years after the end of the accounting period in respect of the profits of which the assessment is made, and in the absence of a satisfactory return or other information on which to make an assessment the Commissioners may make an assessment according to the best of their judgment." (5.) "The amount of corporation profits tax payable shall be recoverable as a debt due to His Majesty from the company on which it is assessed, or in the case of a foreign company from the person in whose name the company is chargeable, and where the amount of tax payable is less than fifty pounds the tax shall, without prejudice to any other remedy, be recoverable summarily as a civil debt."

The receiver contending that the Crown was a preferential creditor in respect of the said sum of 492*l.* 14*s.*, this summons was taken out under Order LV., r. 69, to obtain the opinion of

RUSSELL J. the Court as to whether, until the receiver had paid the sum in question for corporation profits tax, the Master could properly certify that all preferential debts had been paid.

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The arguments are stated in the judgment.

Gavin Simonds for the Commissioners of Inland Revenue.

Roland Burrows for the receiver.

Cur. adv. vult.

March 12. RUSSELL J. It is clear from s. 56 of the Finance Act, 1920, that in ordinary parlance corporation profits tax is an assessed tax, that is, it is a tax which is levied by assessment and for which there is no liability before assessment. It is said, however, that this is not an assessed tax within the meaning of s. 209 of the Companies (Consolidation) Act, 1908, and that on two grounds.

It is said that s. 209 does not apply to any assessed tax imposed subsequently for the first time. In my opinion this is to take too narrow a view. The words "all assessed taxes" are wide words, and I see no reason for confining them to such assessed taxes as existed in 1908. The case of *Associated Newspapers, Ld.* v. *Corporation of City of London* (1) seems to me to support this view. It is true that the phrase there under discussion contained the word "whatsoever," but as I read the judgments the decision did not turn on the presence of that word, but was based upon the view that a statutory exemption from all taxes should not be confined to existing taxes but included future taxes as well. In the same way it appears to me that a statute which, for the public benefit, grants the Crown priority in respect of "all assessed taxes" should be construed as referring to all assessed taxes present and future.

It was next contended that the fact that s. 209 of the Companies (Consolidation) Act, 1908, specifically mentions land tax and income tax, which are taxes of assessment, as well as "all assessed taxes," shows that these latter words are used in a special sense, and that in fact such words have a

(1) [1916] 2 A. C. 429.

special statutory meaning by virtue of which they are confined to a limited class of taxes—namely, the taxes levied under Schedules A to K of 48 Geo. 3, c. 55. This Act, which did not initiate this class of taxation, is entitled, " An act for repealing the duties of assessed taxes and granting new duties in lieu thereof, and certain additional duties to be consolidated therewith. . . . ." Sch. A related to houses, windows and lights : Sch. B to inhabited houses : Sch. C to male servants : Sch. D to carriages : Schedules E and F to horses, mares, geldings and mules : Sch. G to dogs : Sch. H to horsedealers : Sch. I to hair powder and Sch. K to armorial bearings. By 14 & 15 Vict. c. 36 the duties payable under Sch. A, which were assessed and levied according to the number of windows or lights, were repealed, and in lieu thereof duties on inhabited dwelling houses were assessed and levied according to the annual value of the houses. By s. 2 it is provided that these new duties " shall be denominated and deemed to be duties of assessed taxes " : this, it was said, showed that the Legislature was specifically admitting these new duties into the select list of taxes known as " assessed taxes," that is, the taxes levied under the Schedules to the Act of Geo. III. Numerous other statutes were referred to in which the phrase " assessed taxes " occurs, which in the context and in the circumstances of the time could only apply to the limited class in question. Further by 4 Geo. 4, c. 11, which is entitled " An act for repealing certain of the duties of assessed taxes ; for reducing certain other of the said duties ; and for relieving persons who have compounded for the same," provision is made for annually laying before Parliament copies of all cases stated by the Commissioners for judicial opinion, and of the judges' opinions. Of these opinions there are six volumes, covering a period from 1823 to 1866, and Mr. Burrows assured me that no cases or opinions relating to income tax or land tax occur therein. Reliance was also placed upon 5 & 6 Vict. c. 37, s. 3, in which reference is made to " the Acts relating respectively to the land tax, the duties of assessed taxes, and the duties on profits arising from property, professions, trades, and offices." Here, it is said, you have in clear terms the distinction drawn,

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just as in s. 209 of the Companies (Consolidation) Act, 1908, between "assessed taxes," "land tax" and "income tax." The next step in the argument was to trace the origin of ss. 107 and 209 of the Companies (Consolidation) Act, 1908. The pedigree would appear to be as follows: By s. 166 of the Bankruptcy Act, 1849, the Court is to order payment out of the estate of "all duties of assessed taxes" assessed on the bankrupt at the time of his bankruptcy up to the fifth day of April next after the same shall have happened, but not exceeding in the whole one year's assessment. It will be observed that land tax and income tax, though in force at that date, are not specifically mentioned. By s. 32 of the Bankruptcy Act, 1869, priority is given to certain debts which include "all assessed taxes land tax and property or income tax" with the limitations there mentioned. Here land tax and income tax are specifically referred to. So far no such provision applied to the case of companies which were being wound up.

The Judicature Act, 1875, s. 10, provided that in the winding up of any company under the Companies Act whose assets proved insufficient for the payment in full of its debts, liabilities, and costs the same rules should prevail, as to the respective rights of secured and unsecured creditors and debts and liabilities provable, as might be in force for the time being under the law of Bankruptcy.

Sect. 32 of the Bankruptcy Act, 1869, was replaced by s. 40 of the Bankruptcy Act, 1883, which is in very similar terms to s. 32, and contains the words "all assessed taxes land tax property or income tax."

In 1888 was passed the Preferential Payments in Bankruptcy Act, 1888, the first section of which provides that in the distribution of the property of a bankrupt, and in the distribution of the assets of any company being wound up under the Companies Acts, there shall be paid in priority to all other debts (inter alia) "all assessed taxes land tax property or income tax."

It had been decided (see *In re Albion Steel and Wire Co.* (1))

(1) (1878) 7 Ch. D. 547.

that s. 10 of the Judicature Act, 1875, did not operate to apply the bankruptcy provisions for priority in respect of rates and taxes to companies in liquidation; accordingly the Act of 1888 in terms applies them to the distribution of the assets of any company being wound up under the Companies Acts.

The Preferential Payments in Bankruptcy Amendment Act, 1897, introduced two new features. By s. 2 the preferential debts are given priority, in the winding up of a company under the Companies Acts, over the claims of debenture holders under a floating charge; and by s. 3 it is provided that in case a receiver is appointed on behalf of the holders of debentures or debenture stock secured by a floating charge, if the company is not at the time in course of being wound up, the preferential debts shall be paid forthwith out of any assets coming to his hand.

By the Companies (Consolidation) Act, 1908, this Act is wholly repealed, as are also ss. 1, 2, and 3 of the Preferential Payments in Bankruptcy Act, 1888, so far as they relate to companies, and the matter now depends on ss. 107 and 209 of the Companies (Consolidation) Act, 1908. Sect. 107 directs that the preferential debts shall be forthwith paid out of any assets coming to the receiver. Sect. 209 defines the preferential debts and includes therein "all assessed taxes, land tax, property or income tax." The original source of s. 209 as regards companies is the Preferential Payments in Bankruptcy Act, 1888. The original source of s. 107 is the amending Act of 1897. The sections themselves were enacted in 1908. Assuming that, because the Act of 1908 is a consolidating Act, I am bound to construe those sections in the light of the circumstances existing in 1888 and in 1897 respectively, what meaning am I to attribute to the words "all assessed taxes"? Am I to go back to 1849 or 1869, and say that because, assuming it to be the fact, in the Bankruptcy Acts of those years the words "all assessed taxes" could only refer to the taxes levied under the Schedules to the Act of Geo. 3, c. 55, therefore I am bound to give the same limited meaning to the words when they occur in later statutes?

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This proposition appears to me an unjustifiable one. I will read a passage from the speech of Lord Wrenbury in *Food Controller* v. *Cork* (1) which expresses my view. Lord Wrenbury says: "My Lords, I listened with interest to the historical review which the Attorney-General gave your Lordships of the development of the statute law relevant to the matter before the House. But I derive little, if any, assistance from the knowledge that, for instance, a particular section is in terms identical with a section which as the law previously stood was found in a framework different from that in which it is now found. To ascertain the present law it is necessary to consider such a section in the framework in which it now stands. In other words, I have to consider the statute law as it is."

The proposition is all the more unjustifiable when it is pointed out that such of the assessed taxes under the Act of Geo. 3, c. 55, as then still survived were all abolished (by 32 & 33 Vict. c. 14) as taxes the subject of assessment, some being retained but converted into excise duties. To answer the words "all assessed taxes" if used in the limited sense contended for, there only survived inhabited house duty.

There seems to me no reason why the words "all assessed taxes" should not be given their natural meaning so as to include all taxes levied by assessment. It is true that land tax and income tax are assessed taxes and need not, in this view, have been specially mentioned. But of the two alternatives, (1.) that the Legislature has inserted words which are strictly unnecessary, and (2.) that the Legislature by the words "all assessed taxes" was referring only to a class of taxes which had long since ceased to exist, I prefer the former.

One further point remains to be noticed. Mr. Burrows argued that if the words "all assessed taxes" included corporation profits tax, s. 56, sub-s. 3, of the Finance Act, 1920, would have been unnecessary. This argument is unsound. Sect. 56, sub-s. 3, does not deal with priorities at all; it deals with all corporation profits tax which may be

(1) [1923] A. C. 647, 668.

payable and not only with the year's assessment; it appears to be a general warning to liquidators and receivers coupled with a penalty in case they fail to observe it.

In my opinion, unless and until the receiver pays the sum in question for corporation profits tax, the Master may not properly certify that all preferential debts have been paid.

The plaintiff must pay to the Commissioners of Inland Revenue their costs of this application. The costs of the plaintiff and defendant will be costs in the action, the plaintiff's costs to include the costs paid to the Commissioners.

Solicitors: *The Solicitor of Inland Revenue; Dehn & Lauderdale.*

J. B. B. M.

YORK CORPORATION *v.* HENRY LEETHAM AND SONS, LIMITED.

Applied. VICTORIA MOTORS (SCARBOROUGH) LD. *v.* WURZAL [1951] 2 K. B. 520

Followed. WILLIAM CORY & SON LD. *v.* LONDON CORP. [1951] 2 K. B. 476

[1921. Y. 1402.]

Corporation—Statutory Powers—Navigation of River—Power to charge Tolls—Contract not to exercise Powers—Contract hampering Powers—Ultra vires—Undue Preference.

The plaintiffs were by statute entrusted with the control and management of part of the navigations of the Rivers Ouse and Foss, in Yorkshire, with power to charge such tolls, within limits, as the Corporation deemed necessary to carry on the two navigations in which the public had an interest. In 1888 the Corporation entered into two agreements with the firm of Henry Leetham & Sons. By the Ouse agreement the Corporation covenanted to allow the firm, their successors and assigns, the right to carry cargoes on the Ouse in consideration of the annual payment of 600*l.* in place of the authorized dues and charges, with a proviso that there should each year be refunded to the firm, their successors and assigns, the difference between the 600*l.* and the amount ordinarily charged on the traffic actually carried. By the Foss agreement the firm covenanted to pay the Corporation 200*l.* per annum for twenty years as a composition for the ordinary tolls, and the Corporation covenanted to allow the firm, their successors and assigns, the free use of the Foss navigation, on payment of 200*l.* per annum in lieu of tolls, for such further term or terms as the firm, their successors or assigns, might from time to time desire. The defendants were the successors of Henry Leetham & Sons:—

Held, (1.) that the agreements were ultra vires, because during their

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currency, which depended on the wishes of the defendants, the Corporation, no matter what emergency might arise, had disabled itself from exercising its statutory powers to increase the tolls so far as might be necessary; and that, being ultra vires at the date of their execution, the agreements did not become intra vires by reason of estoppel, lapse of time, ratification, acquiescence, or delay; (2.) that in view of the provisions of s. 6 of the Railway and Canal Traffic Act, 1854, it was not open to the plaintiffs to allege that the agreements were void on the ground that they gave the defendants an undue preference.

WITNESS ACTION.

In this case the plaintiffs sued for a declaration that two agreements, executed by them in the year 1888, were illegal and invalid on the ground that the agreements were and are ultra vires the plaintiffs. The defendants contended that the agreements in question were binding on the plaintiffs, that they had not been determined, and they counterclaimed for repayment of a sum of 3231*l.* 5*s.* 4*d.* The agreements, which were dated October 1, 1888, were entered into by the plaintiffs as to one (which may be called the Ouse agreement) in their capacity as the persons entrusted with the control and management of the navigation of a portion of the River Ouse in Yorkshire, with power to charge tolls and dues to persons using the navigation between certain points; and as to the other (which may be called the Foss agreement) in their capacity as the proprietors and persons having the management and control of the navigation of the River Foss, from its junction with the River Ouse to a point above the York Union Workhouse, with power to charge tolls and dues to persons using such navigation.

First, as regards the Ouse: An Act of Parliament (13 Geo. 1, c. xxxiii.) was passed in 1726 entitled "An Act for improving the navigation of the River Ouse in the County of York." It was passed "To the intent that the said river as well for the good of the publick in general and of the inhabitants of the said city (York) as also of such as shall trade and pass thither and from thence with merchandises may be effectually repaired, amended, maintained and improved." By this Act trustees were appointed for making navigable the River Ouse, and were entrusted with powers for that purpose. Commissioners also were appointed for the purpose of settling

differences which might arise and for other purposes. The commissioners and trustees were empowered to lay tolls on all wares, merchandise, or other commodities, with certain exceptions, carried on the river above Wharfmouth not exceeding the various rates for the various goods there specified, and it was to be lawful for the trustees, their successors, assigns and nominees "and no others" from time to time and at all times to recover and take "such reasonable tolls or rates as shall be so laid as aforesaid and no other." The Act contained a power to mortgage the profits arising by the tolls to secure the repayment of moneys borrowed for carrying on the work, and a proviso that as soon as sufficient money should, in the opinion of the commissioners, be raised by virtue of the Act for the purposes aforesaid, then after all borrowed moneys had been repaid the commissioners might "abridge and moderate the aforesaid duties or rates." The commissioners and trustees under that Act laid the tolls and rates therein mentioned to the full extent of the power given them, but the income was found insufficient. Accordingly by a further Act (5 Geo. 2, c. xv.) it was enacted that from and after June 24, 1732, all commodities carried on the Ouse above Wharfmouth, with certain exceptions, "shall bear the tolls or rates following." Then follow descriptions of goods and specified payments per ton. The next section provides that it shall be lawful for the trustees, their successors, assigns and nominees "and no others" from time to time and at all times to recover and take "the tolls and rates by this Act directed to be taken and no others," in lieu of the tolls and rates imposed and charged on the goods mentioned in the former Act. The profits arising from the tolls might be mortgaged to raise money for carrying on and improving the navigation, and it was provided that as soon as sufficient money, in the opinion of the commissioners, had been raised for the purposes of the two Acts, then after the repayment of all borrowed moneys the commissioners might "abridge and moderate the said duties or rates." By s. 72 of the Municipal Corporations Act, 1835, it is provided that the body corporate named in the Schedules A and B in conjunction with any

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borough shall be trustees for executing by the council of such borough the powers and provisions of all Acts of Parliament made before the passing of that Act other than Acts made for securing charitable uses and trusts. Sch. A names the Mayor and Commonalty of the City of York in conjunction with the Borough of York. This section has now been replaced by s. 134 of the Municipal Corporations Act, 1882, which enacts that the municipal corporation of a borough shall be trustees for executing by the council the powers and provisions of all Acts of Parliament made before the passing of the Municipal Corporations Act, 1835, other than Acts made for securing charitable uses and trusts. Thus the plaintiffs became and are the successors of the trustees under the Acts of George I. and George II., and are entrusted with their duties and invested with their powers.

Secondly, as regards the Foss: By an Act (33 Geo. 3, c. xcix.) which recites that the making and maintaining a navigable communication from the junction of the River Foss with the River Ouse to Stillington Mill will be of public utility, the Foss Navigation Company was incorporated for making, carrying on, completing and maintaining the said navigable communication, and was invested with divers powers for that purpose. The company's original capital was to be 25,400*l.* in 100*l.* shares with power to raise an additional 10,000*l.* in similar shares or by borrowing. It was further provided that the company might from time to time and at all times take and recover for their own use, for tonnage and wharfage of all goods carried along the navigation, rates not exceeding the specified amounts per ton per mile. The rates were to be fixed by the company at their first meeting, with power to reduce rates, and to advance reduced rates, but no reduction was to be made without the consent of proprietors possessed of at least two-thirds of the shares. By a subsequent Act (41 Geo. 3, c. cxv.) provision was made for raising further moneys, for restricting the works to a point short of Stillington Mill, and for charging additional rates or duties. By the York Drainage and Sanitary Improvement Act, 1853, provision was made by s. xi. enabling and requiring the York Corporation

to acquire the undertaking of the Foss Navigation Company, and all the tolls, rates, duties, rights, powers and privileges of the company in relation thereto, and it was provided (s. xii.) that upon payment of the purchase money the Corporation from thenceforth might exercise all the powers and rights in the same or like manner as if the name of the Corporation had been inserted in the Acts of George III. in lieu of the name of the company. Sects. xlviii. and lvi. contained provisions for the raising by the Corporation and the application of moneys by means of a "sanitary improvement rate." The purchase money was duly paid on December 23, 1853. By the York Improvement Act, 1859, the Foss Navigation became restricted to the portion of the river between its junction with the Ouse and a point about 200 yards above the York Union Workhouse. The result is that the Foss Navigation became and is the property of the York Corporation as corporate property.

Some years after 1880 there was a firm of millers and corn merchants at York called Henry Leetham & Sons. They were the predecessors of the defendants, a limited company incorporated in 1889. The firm's premises, Hungate Mills, were situate on the eastern side of the Foss above the Foss lock. Their lands lay a little off the river. Their goods were not carried up the Foss, but were barged up the Ouse to York, where they were landed and carted to the mill, a procedure productive of expense both to the firm, for carting, and to the York Corporation by wear and tear of the streets. The firm were considering the question of transferring their operations from York to the port of Hull and, in 1885, they approached the Corporation. Negotiations ensued which resulted in the two agreements in question. By the Ouse agreement the Corporation covenanted to allow the firm, their successors and assigns, the right to carry cargoes on the Ouse in consideration of an annual payment of 600*l.* in lieu of the authorized dues and charges, with a proviso that there should be refunded to the firm each year the difference between the 600*l.* and the amount ordinarily chargeable on the traffic actually carried. The firm covenanted to pay the sum of

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600*l.* per annum. There was power to the Corporation to determine the agreement in the event of the Corporation determining the Foss agreement, or in the event of the firm neglecting duly to pay the 600*l.* per annum. By the Foss agreement the Corporation covenanted with the firm to construct a new and enlarged lock and to carry out other works involving a total outlay of over 4500*l.*, and further in consideration of the annual payment to them of the sum of 200*l.* by the firm and of a guarantee of such payment as therein contained, to allow, so long as the Hungate Mills were not permanently abandoned for the manufacture of flour, the firm, their successors or assigns, the use of the Foss Navigation freed and discharged from all liability to pay any further sum in respect of dues or rates in the nature of tonnage rates upon goods or merchandise carried by or for them thereon in the ordinary course of their trade or business as corn millers and corn merchants. The Corporation further covenanted that they would demise to the firm for a term of 999 years a plot of land therein mentioned, part of Foss Island, and allow them to connect Foss Island with their Hungate property by means of a bridge, and further that they would as trustees of the Ouse Navigation enter into the Ouse agreement. The firm covenanted to pay the 200*l.* per annum for twenty years. The Corporation bound themselves to allow the firm, their successors and assigns, the free use of the Foss Navigation, on payment of 200*l.* per annum in lieu of dues, for such further term or terms as the firm, their successors or assigns, might from time to time desire to make such payment. The firm further covenanted to erect a corn mill and other buildings at a cost of not less than 10,000*l.* The Corporation were entitled to determine that agreement (1.) If there was default in payment of the 200*l.* per annum; (2.) If the firm failed to comply with their covenants; and (3.) If the Corporation determined the Ouse agreement.

The Corporation executed the works which they had covenanted to execute. The firm spent large sums (far in excess of the 10,000*l.*) in erecting their new buildings. In other respects the agreements were for many years acted upon.

By the Canal, Tolls and Charges, No. 7 (River Ancholme, etc.), Order Confirmation Act, 1894, a Provisional Order, made by the Board of Trade under the Railway and Canal Traffic Act, 1888, was confirmed and given statutory force. By the Order it was provided that the maximum tolls which the proprietors of the canals and navigations named in the Schedule to the Order should be entitled to charge should be the tolls and charges specified in the Schedule. The Ouse and Foss Navigations are both named in the Schedule. The relevant class of merchandise is Class C. In the case of the Ouse the maximum toll for that class is $\frac{3}{4}d.$ per ton per mile; in the case of the Foss it is $3d.$ per ton.

In the year 1908 disputes had arisen between the parties, the defendants having in the year 1889 succeeded to the rights and liabilities of the firm under the two agreements. A further agreement was entered into dated October 29, 1908, supplemental to the Ouse agreement and the Foss agreement, by which the plaintiffs and defendants made a working arrangement without giving up their respective claims. Clause 3 of that agreement is in the following terms: "Until notice in writing is given by the Company to the Corporation of their intention to cease from making the payment in this clause mentioned or until the Corporation give notice in writing to the Company of the desire of the Corporation that such payment shall no longer be made the Company shall make to the Corporation a payment of Two hundred and seventy five pounds per annum for the purposes And to the account of the Foss Navigation such payment to commence as from the date hereof and to be and be deemed to be as from the date hereof an addition to the sum of Two hundred pounds per annum which the said Henry Leetham Sidney Leetham Herbert Leetham and Henry Ernest Leetham did by the Foss Agreement covenant to pay to the Corporation. And to be paid in like manner and subject to the like conditions as apply to the payment of the said sum of two hundred pounds. Provided always and it is hereby agreed and declared that if such notice as hereinbefore mentioned is given by either the

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Company or the Corporation then and in such case the Corporation shall forthwith repay to the Company all such annual sum or sums of Two hundred and seventy five pounds (but not exceeding in any case twenty such annual sums) which has or have been theretofore paid by the Company to the Corporation under the provisions of this clause." This agreement was acted upon, and in due course notice was given by the defendants of their desire to continue the payment of 200*l.* per annum in lieu of dues for the further term of twenty years in accordance with the provisions of the Foss agreement.

On July 11, 1921, the defendants gave notice of their intention as from that date to cease from making the payment of the 275*l.* per annum mentioned in cl. 3 of the agreement of October 29, 1908, and requiring repayment of all the annual sums of that amount—namely, 3231*l.* 5*s.* 4*d.*, paid to the Corporation under the provisions of that clause. The question of the invalidity of these agreements on the ground of ultra vires had long been in the air. As far back as November, 1900, negotiations were on foot with the defendants with a view to avoiding proceedings for testing their validity. Such proceedings were again threatened or suggested in 1904 and counsel's opinion was taken. Ultimately the writ in this action was issued on December 21, 1921.

Tyldesley Jones K.C. and *J. E. Harman* for the plaintiffs. The Corporation is the manager, with statutory powers, of undertakings in which the public are interested, and as such is entitled to charge the tolls, within certain limits, necessary for the management. The Corporation has by the two agreements of 1888 contracted in the case of the defendants not to exercise its statutory powers beyond a certain limit. Such agreements were and are ultra vires the Corporation. Void agreements are incapable of ratification, no conduct of the plaintiffs can make an estoppel, and acquiescence is of no avail: *Great North-West Central Ry. Co.* v. *Charlebois.* (1) A Corporation of a public nature may not so deal with its

(1) [1899] A. C. 114.

property as either to incapacitate itself from performing, or to fetter itself in the full performance of its public duties: *Staffordshire Canal Navigation* v. *Birmingham Canal Navigation* (1); *Ayr Harbour Trustees* v. *Oswald* (2); *Mulliner* v. *Midland Ry. Co.* (3); Brice on Ultra Vires, 3rd ed., at p. 111. Just as in *Ayr Harbour Trustees* v. *Oswald* (2) it was decided that the trustees who had acquired land under their statutory powers could not preclude themselves, or their successors, from the exercise of the statutory powers required from time to time for the purposes of the harbour, so here the Corporation cannot preclude itself, or its successor, from exercising its statutory power to charge the tolls that may be required from time to time to maintain the navigations of the Foss and the Ouse. A contract by which an undertaker binds himself not to charge his maximum statutory tolls is just as ultra vires as the grant of water required for a canal: *Staffordshire Canal Navigation* v. *Birmingham Canal Navigation* (1), just as hampering as the grant of a perpetual right of way over land that would be required for lines of rails: *Great Central Ry. Co.* v. *Balby-with-Hexthorpe Urban Council* (4), or the grant of a right of way that would put greater strain on the finances of the grantor: *Great Western Ry. Co.* v. *Solihull Rural Council.* (5)

The principle that a body invested with statutory powers for a public purpose cannot delegate, or divest itself of those powers, or agree not to exercise them, or create any rights which will prevent or hamper the proper conduct of the statutory undertaking, is also illustrated by the following cases: *Gardner* v. *London, Chatham and Dover Ry. Co.* (6); *Weller* v. *Ker* (7); *Rochdale Canal Co.* v. *Radcliffe* (8); *Foster* v. *London, Chatham and Dover Ry. Co.* (9); *Taff Vale Ry. Co.* v. *Pontypridd Urban Council* (10); *Creyke* v. *Corporation of the*

(1) (1866) L. R. 1 H. L. 254.
(2) (1883) 8 App. Cas. 623.
(3) (1879) 11 Ch. D. 611.
(4) [1912] 2 Ch. 110.
(5) (1902) 86 L. T. 852.
(6) (1866) L. R. 2 Ch. 201.
(7) (1866) L. R. 1 H. L. Sc. 11.
(8) (1852) 18 Q. B. 287.
(9) [1895] 1 Q. B. 711.
(10) (1905) 3 L. G. R. 1339.

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Level of Hatfield Chase (1); *County Hotel and Wine Co.* v. *London and North Western Ry. Co.* (2)

These agreements also constitute an undue preference, and are therefore void under s. 2 of the Railway and Canal Traffic Act, 1854. It is true that s. 6 prevents the plaintiffs coming to this Court to complain of an undue preference: *Perth General Station Committee* v. *Ross* (3), but it is submitted that this Court has jurisdiction to decide that a contract contravening the section is null and void. The fact that the agreements were entered into in consideration of the defendants agreeing to remain at York is not a circumstance that justifies a preference: *Fairweather & Co.* v. *York Corporation* (4); *Harris* v. *Cockermouth and Workington Ry. Co.* (5)

Cunliffe K.C., *Courthope Wilson K.C.* and *Alan Ellis* (*Sheldon* with them) for the defendants. This Court has no jurisdiction to consider the question of undue preference: *Anderson* v. *Midland Ry. Co.* (6); *Lancashire and Yorkshire Ry. Co.* v. *Greenwood & Sons.* (7) *Fairweather & Co.* v. *York Corporation* (4) was a decision on the facts in a contest between different parties and does not bind the parties in this case. The Corporation is entitled to take tolls in return for public services, but is not bound, apart from express provision, to exact the same tolls from all persons alike: *Hungerford Market Co.* v. *City Steamboat Co.* (8); *Duke of Newcastle* v. *Worksop Urban Council.* (9) A company with statutory charging powers can agree to carry at a lower rate for a particular individual, in consideration of a guaranteed minimum toll, in order to enable them to enter into successful competition with a rival line of railway: *Strick* v. *Swansea Canal Co.* (10) The doctrine of ultra vires ought to be reasonably understood and applied, and whatever may be regarded as incidental to and consequential on what the Legislature has authorized, should not,

(1) (1896) 12 Times L. R. 383.
(2) [1921] 1 A. C. 85.
(3) [1897] A. C. 479.
(4) (1900) 11 Ry. & Can. Tr. C. 201.
(5) (1858) 1 Ry. & Can. Tr. C. 97.
(6) [1902] 1 Ch. 369, 374.
(7) (1888) 21 Q. B. D. 215.
(8) (1860) 30 L. J. (Q. B.) 25, 31.
(9) [1902] 2 Ch. 145.
(10) (1864) 16 C. B. (N. S.) 245.

unless expressly prohibited, be held to be ultra vires: *Attorney-General* v. *Great Eastern Ry. Co.* (1)

It was argued that the Ouse Act of 1732 contains an imperative direction that the tolls fixed by the Act and "no others" are to be charged. If that be so, however desirable it might be to encourage traffic, the Corporation could make no concession. The Ouse Act of 1726 merely gives power to recover the maximum sum fixed by the commissioners and the trustees, or any less amount they think proper in the circumstances.

The plaintiffs say that the two agreements of 1888 are contracts not to exercise statutory powers. It is submitted that the agreements were an exercise of the statutory powers, and the payments made under the agreements were tolls: *Great Northern Ry. Co.* v. *South Yorkshire and River Dun Ry. Co.* (2)

Under the Canal Tolls and Charges No. 7 Order Confirmation Act, 1894, the Corporation may charge less than the maximum tolls. The 1908 agreement treats the agreements of 1888 as existing. It recites "the Foss agreement expires on October 5, 1909, and is renewable on notice to the Corporation. The Ouse agreement continues in force." The 1908 agreement is a new contract between the parties, and the Court should treat it as a renewal of the contracts of 1888. After the passing of the 1894 Act a fresh agreement which was intra vires the Corporation was entered into—namely, that of 1908. The doctrine that a body cannot alienate land given it for a statutory purpose, or that a grant of land will not be implied where such a finding would lead to the necessary frustration of the purposes of the body, has never been applied to a contract to reduce a toll. The statutory purpose of this undertaking was to maintain the navigation of the rivers, tolls were only the ways and means; but the plaintiffs argue that the primary purpose was to charge fixed tolls, and that therefore a contract not to do so was a contract not to exercise statutory powers.

Cur. adv. vult.

(1) (1880) 5 App. Cas. 473, 478. (2) (1854) 9 Ex. 642, 646.

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Feb. 27. RUSSELL J. stated the facts and continued: Upon the true construction of those two agreements I am of opinion that their duration depends entirely upon the will of the firm; that so long as the firm desires to keep the Corporation bound by them they can keep them so bound; and that there are no means of escape from them by the Corporation against the will of the firm. The defendants now stand in the shoes of the firm.

The position accordingly in 1888 was this. The Corporation, whether as trustees of the Ouse Navigation or as owners (as part of their corporate property) of the Foss Navigation, were managers of undertakings in which the public were interested, and for the management of which they were invested with statutory powers. Pre-eminent among these statutory powers was the power of levying such tolls, within limits, as they should think fit and necessary from time to time for the purpose of managing the respective undertakings. By the Ouse agreement they deprived themselves, it may be for ever, of the right to charge a particular customer of the Ouse Navigation tolls to any amount beyond 600*l.* per annum. By the Foss agreement they similarly deprived themselves of the right to charge the same customer tolls beyond 200*l.* per annum. The two agreements in so far as their provisions required immediate performance were carried out. Evidence was given before me as to the practical operation of the agreements, from which it appears that very much less was paid by the defendants under the two agreements for the tonnage carried than would have been paid if the tolls charged to other users of the Navigation had been charged on the tonnage of the defendants' goods. For the period of ten years —namely, 1910 to 1921 inclusive, the moneys actually paid by the defendants in respect of the Ouse work out at an average of 0·9*d.* per ton in respect of the Ouse, and an average figure of 0·7*d.* per ton in respect of the Foss. Had the prevalent tolls been charged these averages would have been 3·2*d.* and 2·6*d.* respectively. The Foss figures include the extra 275*l.* paid under the agreement of October 29, 1908. This evidence must be considered with this qualification—that it by no

means follows that the traffic of the defendants which was carried on the two rivers during the operation of the agreements would have been forthcoming to the same extent or at all if the agreements had not been entered into. But in my opinion the evidence is immaterial. The question of ultra vires is not to be decided by the pecuniary result of the bargain which was struck. If the bargain was at its date within the powers of the Corporation the fact that it turned out a bad bargain from their point of view would not convert it into an ultra vires transaction. Conversely if it was at its date beyond the powers of the Corporation the fact that it proved a profitable one for the Corporation would not render it intra vires.

As I have already indicated, the plaintiffs are invested with statutory powers of charging such tolls, within limits, as they may deem necessary for the purpose of carrying on these two undertakings in which the public are interested. The effect of these two agreements is that they bind themselves for a period, the duration of which depends upon the volition of the defendants, not to exercise those powers as against them. No matter what emergency may arise during the currency of the agreements the Corporation have deprived themselves of the power to charge the defendants such increased tolls as might enable them to cope with the emergency. They have for so long a time as the defendants desire to that extent wiped out or fettered their statutory power. If that be, as I think it is, the effect of these agreements, they are, in my opinion, agreements which are ultra vires the Corporation.

In the case of *Ayr Harbour Trustees* v. *Oswald* (1) the question for decision was whether Harbour Trustees in exercising statutory powers of purchase of land could enter into a binding contract not in the future to exercise powers which they possessed to make erections on the land taken which would affect the frontage of the remaining land of the landowner. It was held that such a contract was void, it not being competent for the Trustees to dispense with the future exercise of such powers. Lord Blackburn uses the following

(1) 8 App. Cas. 623, 634.

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language: "I think that where the Legislature confer powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the Legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void. This is, I think, the principle on which this House acted in *Staffordshire Canal* v. *Birmingham Canal* (1), and on which the late Master of the Rolls acted in *Mulliner* v. *Midland Ry. Co.* (2) In both those cases there were shareholders, but, said the Master of the Rolls: 'Now for what purpose is the land to be used? It is to be used for the purposes of the Act, that is, for the general purposes of a railway. It is a public thoroughfare, subject to special rights on the part of the railway company working and using. But it is in fact a property devoted to public purposes as well as to private purposes; and the public have rights, no doubt, over the property of the railway company. It is property which is allowed to be acquired by the railway company solely for this purpose, and it is devoted to this purpose.'" Then Lord Blackburn continues: "This reasoning, which I think sound, is a fortiori applicable where there are no shareholders, and the purposes are all public." Lord Watson states the matter in this way (3): "The case, according to the view which I take of the provisions of the Harbour Act of 1879, stands thus: The statute expressly says that the trustees shall, in all time coming, possess, and may, whenever they think fit, exercise the power of altering the condition of the harbour works ex adverso of the respondent's land, so as to exclude

(1) L. R. 1 H. L. 254. (2) 11 Ch. D. 611, 619.
(3) 8 App. Cas. 639.

direct access from it to the harbour. The minute lodged in the arbitration by Provost Steele, as representing the present body of trustees, especially declares that in future the trustees shall not possess, or at least shall not exercise, that power. To give effect to the terms of the minute would, in my opinion, be to affirm that the appellants have power to repeal the provisions of the Act, in so far as these apply to the land taken from the respondent; and as I can find no indication of an intention on the part of the Legislature to vest any such power in the appellants, I think the minute is altogether invalid." Lord FitzGerald says (1): "I am of opinion that having so acquired that land for the purposes expressed in section 4 and amplified in section 10 of their special Act, they have no power in law to preclude themselves or their successors from the exercise of their statutable powers over it, as should be from time to time required for the purposes of the harbour. The minuters are not bound by their own minute." As Lord Blackburn points out, this case only reaffirms the principles laid down by the House of Lords in the case of the *Staffordshire Canal Navigation* v. *The Birmingham Canal Navigation*. (2) I need not state the particular facts of that case; it will be sufficient if I read extracts from the judgments. Lord Chelmsford uses the following language (3): "But the appellants contended that, although this may originally have been all they were entitled to under the Act of Parliament yet that they have since acquired a right to the quantity of water discharged from the respondents' locks into their canal by long user under the Prescription Act. The 2nd section of that Act (2 & 3 Will. 4, c. 71) applies to a claim to the user of water which may be lawfully made at the Common Law, by custom, prescription, or grant. Custom and prescription are here out of the question, and if the respondents could not have granted the use of the water to the appellants, the Act is wholly inapplicable; but the respondents have not the water in their canal with an absolute power of dealing with it at their pleasure. When

(1) 8 App. Cas. 640. (2) L. R. 1 H. L. 254.
(3) L. R. 1 H. L. 267.

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the canal was made, under the provisions of the Act of 8 Geo. 3, the public had a right to use it upon payments of tolls, and the respondents were bound to keep and maintain the canal in an efficient state for the passage of the traffic along it. They could not bind themselves that, for all time to come, a certain quantity of water should be discharged from their canal into that of the appellants, because it was impossible for them to know whether all the water beyond what was necessary to keep open the communication between the two canals would not be wanted for the purpose of their own canal. By a grant of the continual use of the quantity of water flowing from their canal into the canal of the appellants, the respondents would have fettered themselves in the exercise of the powers vested in them by the Act for extending, preserving, and improving their canal, for which the application of all the water beyond what was necessary for keeping up the communication between the two canals might have been essential. To impose such a servitude upon the water in their canal as that contended for by the appellants would have been ultra vires of the respondents." Lord Westbury says (1): "But if the Prescription Act had been at all applicable it would be incumbent on the appellants to prove that the right founded on the claim by user might, at the beginning of, or during that user, have been lawfully granted to them by the respondents' company. No such proposition can be maintained. Had any grant been made at any time by the respondents' company of the right, now alleged by the appellants to have been acquired against them by user, such grant would have been ultra vires and void, as amounting to a contract by the respondents not to perform their duty by improving their navigation, and conducting their undertaking with economy and prudence."

The same principle underlies many other cases which show the incapacity of a body charged with statutory powers for public purposes to divest itself of such powers or to fetter itself in the use of such powers. I may refer, amongst others, to *Mulliner* v. *Midland Ry. Co.* (2); *Taff Vale Ry. Co.* v.

(1) L. R. 1 H. L. 278. (2) 11 Ch. D. 611.

Pontypridd Urban Council (1); and *Great Western Ry. Co.* v. *Solihull Rural Council.* (2)

The defendants mainly relied upon the case of the *Hungerford Market Co.* v. *City Steamboat Co.* (3), which, it was said, decided that it was within the powers of the plaintiffs (who had statutory power to charge tolls for the use of a wharf for landing or embarking passengers) to charge a lower rate to another steamboat company than the rate which they charged the defendants. The case decides undoubtedly that in the absence of an equality clause there is no obligation to charge the same rates to all. The question of the validity of the agreement with the other steamboat company never arose at all; no one challenged it. Indeed, the plaintiffs were asserting its validity and claiming equality of treatment on the lines of it. No question arose (such as arises here) as to the validity of an agreement which binds a body invested with statutory powers not to exercise them against the will of another. Another decision relied upon by the defendants was the case of *Strick* v. *Swansea Canal Co.* (4) But that case merely decided that even when an equality section exists there is no obligation to charge equal rates for different distances and under different circumstances. No such question arose for decision as falls to be decided in the present case.

For the reasons which I have given I am of opinion that the Ouse agreement and the Foss agreement were agreements which were at the date of their execution ultra vires the plaintiffs. An ultra vires agreement cannot become intra vires by reason of estoppel, lapse of time, ratification, acquiescence, or delay.

This really disposes of the action, but certain other contentions were raised by the plaintiffs, as to some of which I may properly say a few words. The plaintiffs alleged that the agreements gave an undue or unreasonable preference or advantage to or in favour of the defendants and were, therefore, void under s. 2 of the Railway and Canal Traffic Act, 1854. I am not, however, satisfied that it is open to the plaintiffs to

(1) 3 L. G. R. 1339.
(2) 86 L. T. 852.
(3) 30 L. J. (Q. B.) 25.
(4) 16 C. B. (N. S.) 245.

RUSSELL J. 1924 YORK CORPORATION v. HENRY LEETHAM & SONS, LD.

attack the agreements on that ground before this Court in view of the provisions of s. 6 of the same Act.

In the action I declare that the Ouse and Foss agreements were and are illegal and invalid on the ground that they were and are beyond the powers of the plaintiffs.

As regards the counterclaim, the defence thereto was abandoned at the trial and there will be an order on the plaintiffs to pay to the defendants the sum of 3231*l.* 5*s.* 4*d.* As to costs, the plaintiffs have raised some contentions which they failed to establish and they resisted the counterclaim up to trial. In the circumstances I think justice will be done if no order is made as to costs either of the action or counterclaim.

Solicitors: *Sharpe, Pritchard & Co., for Percy J. Spalding, York; Halse, Trustram & Co., for A. E. Hewitt, York.*

J. B. B. M.

ASTBURY J. 1924 *March* 18.

In re SCHOU'S PATENTS.

Patent—Invention for Food Production—Infringing Ingredient—Importation for Sale to Food Manufacturers—Comptroller's limited Licence—Whether Importers entitled thereto—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 38A, *sub-s.* 2—*Patents and Designs Act*, 1919 (9 & 10 *Geo.* 5, *c.* 80), *s.* 11.

A Comptroller's licence under the Patents and Designs Act, 1907, s. 38A, sub-s. 2, "limited to the use of the invention for the purposes of the preparation or production of food . . . . but not otherwise" can only be granted to actual food manufacturers. It cannot be granted to persons who merely import an infringing ingredient for sale to food manufacturers for the express purpose of their manufacture.

THE patentee owned three patents.

Patent A (No. 178,885 of 1920) covered a process for manufacturing margarine by the use of oleaginous materials having water dispersing properties. It claimed the process, the use of such materials, and the margarine so manufactured.

Patent B (No. 187,298 of 1921) covered a particular oleaginous material X specially invented for that purpose. It claimed the process of making that material and the material so made.

Patent C (No. 187,299 of 1922) covered a process for employing X for emulsions other than margarine.

The applicants had imported in small quantities an unpatented oleaginous material called "Yollko" which they sold to margarine manufacturers expressly for the purpose of making their margarine.

On the patentee complaining that they were infringing his patents they applied for a licence, without prejudice to their right to rely on invalidity and non-infringement if the licence were not granted. As they were sellers only and not manufacturers this licence was refused.

On September 13, 1923, the applicants applied to the Comptroller for a compulsory licence under the new s. 38A added to the Patents and Designs Act, 1907, by s. 11 of the Patents and Designs Act, 1919. It only applies to patents applied for after December 23, 1919, when the 1919 Act was passed.

Sub-s. 2 provides that in the case of any patent for an invention "intended for or capable of being used for the preparation or production of food or medicine," the Comptroller shall, "unless he sees good reason to the contrary," grant to any person applying for the same, "a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise"; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable, the Comptroller shall have regard "to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention." Any decision of the Comptroller under this sub-section shall be subject to appeal to the Court.

The applicants stated that "Yollko" was of great utility in the manufacture of the foodstuff margarine, and they desired to import and sell it in large quantities on a commercial scale to margarine manufacturers for making their margarine. For the purpose of the application they admitted that "Yollko" was an infringement of Patent B. They asked for a licence to use, exercise and vend the inventions under the three

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patents for the purposes of the preparation or production of margarine, so worded as to protect the margarine manufacturers to whom they sold "Yollko" against the consequences of infringing Patent A.

The patentee contended that the applicants being merely sellers of "Yollko" and not manufacturers of any foodstuff were not within the ambit of s. 38A, sub-s. 2.

On January 22, 1924, the Comptroller, who was asked to decide this legal point first, held that the applicants were persons entitled to a licence within the sub-section, and, seeing no reason to the contrary, he was prepared to grant them a licence properly limited.

On February 7, 1924, the patentee presented a petition of appeal, which was directed to be served on the Comptroller.

Sir Duncan Kerly K.C. and *Eric Bousfield* for the patentee. The applicants ask for a licence to use, exercise and vend all three inventions for the purposes of the preparation or production of margarine. But they do not themselves intend to prepare or produce margarine. They are mere importers for sale of the infringing substance "Yollko" to margarine manufacturers, and their application is in effect for a licence entitling them to sub-license their purchasers. That is an unheard-of application.

Sect. 38A, sub-s. 2, really only authorizes the Comptroller to grant licences to manufacturers or persons actually using the invention for the production of food, not to mere middlemen. If middlemen could be licensed, how could the patentee ascertain that the imported "Yollko" was in fact used for food production? How could he pursue the sub-purchasers?

It is an accident in the present case that the three patents are owned by one patentee. The case should be dealt with as if they were separately owned, and there were three applications. In that case it would be quite clear that the so-called licence to use Patent A was really a mere power to sub-license manufacturers purchasing "Yollko."

The new s. 29 (Patents Act, 1919, s. 8) clearly implies in sub-ss. 3, 4, that "use" does not include "sell."

James Whitehead K.C. and *Byrne* for the applicants. The new s. 29 throws no light on the case. The old s. 29 merely authorized the Government to use the invention for the services of the Crown. During the war the Government accumulated a quantity of undisposed of war material and took special power to sell it under the new section.

Now what was the object of s. 38A, sub-s. 2? It was to bring the English law to a certain extent into line with foreign law. Foreign law does not allow food-production patents. The English law allows them, and the object of s. 38A, sub-s. 2, was to mitigate their mischief pro tanto by preventing the patentees using their patents to hold up food-production. This is clear from the last few lines of the sub-section.

How is this object to be obtained? It is obtained by providing that in the case of food-production inventions the Comptroller "shall," unless he sees good reason to the contrary, grant to any applicant a licence "limited to the use of the invention for the purposes of the preparation or production of food . . . . but not otherwise." This direction is imperative. There is no limitation as to the applicant. There is no suggestion that he must be a food manufacturer. The only limitation is on the licence—namely, that the invention must be used for food production, "but not otherwise." The last three words obviously refer to cases where the invention could be used for other purposes. Those purposes must be expressly excluded: *In re W., K. J. and W.'s Applications.* (1)

Now here the applicants intend to import and sell "Yollko" in large quantities to margarine manufacturers simply and solely for making their margarine. Surely an importation and sale for that purpose only is using the invention, or rather the infringing "Yollko," for the production of food within the obvious intention of the sub-section: *Saccharin Corporation* v. *Anglo-Continental Chemical Works.* (2) If importers for this purpose cannot be licensed, the office will be flooded with applications from all the margarine manufacturers in the Kingdom.

The Form of Patent (Patent Rules, 1920, Sch. 3, Form A)

(1) (1922) 39 R. P. C. 263, 267. (2) (1900) 17 R. P. C. 307, 319.

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grants the patentee sole privilege to " make, use, exercise and vend the said invention," and to the end that he may enjoy " the sole use and exercise and the full benefit " thereof, forbids other persons " either directly or indirectly " to " make use of or put in practice the said invention . . . . without the consent, licence or agreement of the said patentee."

The patentee's case is that the importation of " Yollko " for sale to margarine manufacturers is " using " or " making use of " his inventions. Otherwise there would be no infringement. But this is clearly a " use " within the sub-section, for which a licence limiting that " use " to the preparation or production of food must be granted unless the Comptroller sees good reason to the contrary. The Comptroller has construed the sub-section according to its obvious intention, and his decision should be affirmed.

Dighton Pollock for the Comptroller took no part in the argument.

ASTBURY J. [after stating the facts and reading s. 38A, sub-s. 2, continued :] The case is an odd one, because the applicants do not intend to make margarine or to use " Yollko " in its manufacture. They merely desire to import " Yollko " in large quantities on a commercial scale and to sell it when imported to margarine manufacturers in competition with the patentee. They submit that they are entitled to a licence so worded as to afford complete protection to their purchasers who make margarine from all the consequences of infringing Patent A.

The patentee contends that the applicants on their own statement have no intention of " using " any of the inventions for the purpose of the preparation or production of food, or at all, and that all that they desire to do is to import and sell " Yollko." The Comptroller, after a patient and careful hearing, has decided, and his reasons are set out in a written judgment, that the applicants have made out their case. I am unable to arrive at the same opinion. The Comptroller says : " The question having been raised by the patentee that the substance ' Yollko ' constitutes an

infringement of one or more of the patents covered by the application, the applicants wish to protect themselves and their customers by obtaining a licence to use, exercise and vend the inventions forming the subject of the patents."

In my opinion, the learned Comptroller was entirely wrong in that statement. The applicants do not wish to use, exercise and vend the Patent A invention at all, and with regard to Patent B for the manufacture of X they do not wish to make, use or exercise the invention, but only to vend the imported article "Yollko." It is quite true that the infringement arising from such an importation and sale is in a sense the "use" of the patented process. But the question is whether under the provisions of s. 38A, sub-s. 2, the word "use" was intended to have any such general application. These being patents intended for or capable of being used for the preparation of food the Comptroller is given power, unless he sees good reason to the contrary, to grant to any person applying for the same a licence to use the inventions for the purposes of the preparation or production of food. The question is whether that means that any man in the street, without any intention of preparing or producing food, can claim a licence under a patent intended for or capable of being used in the preparation of food, or whether there must not be some much more limited construction placed upon the sub-section.

In my opinion, this sub-section ought to be construed strictly. The patentee has obtained certain valuable rights from the Crown which he is entitled to enforce unless they can be taken away from him under the provisions of this sub-section. It is plain therefore that the sub-section must receive a strict interpretation.

The only real question is what is the meaning of the words "grant to any person applying for the same a licence limited to the use of the invention for the preparation or production of food"? Do they mean that the licence should be granted only to a person who wishes to use the invention for the purpose of preparing or producing food? Or can they receive a wider construction and apply generally to any person who

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in no sense intends to prepare or produce food, but who wishes generally to have a licence to infringe? In my opinion, the former is the true construction. An applicant for a licence must fall within a class intended to be benefited by the sub-section. The licence to use the invention for the purpose of the preparation or production of food can only be granted to an applicant who wishes by preparing or producing food to increase the food stock of the country.

The applicants here desire and only desire to have a licence to import and sell "Yollko" in this country. They claim the right under a licence to be so obtained to free every margarine manufacturer to whom they propose to sell the imported article from all consequences of infringing Patent A. Giving the sub-section the best interpretation I am able, I do not think it means that at all. That alone should have caused the Comptroller to "see good reason to the contrary."

The applicants contend that this construction is too narrow, as the object of the sub-section was to make food and medicine available to the public at the lowest possible price consistent with giving the inventor a due reward for his research leading to his invention. But if an inventor of three such patents as exist in this case is to be compulsorily made to grant a licence entitling the licensee to import the product of one patent and authorize everybody to whom he chooses to sell it to infringe another, I do not see how it is possible to give the inventor the reward contemplated in the sub-section.

Secondly, I fail to see how the desirability of making food and medicine available to the public at the lowest possible price consistently with the patentee's rights necessarily points to a mere importing licence like this. Everybody who wants to manufacture "Yollko" or to import "Yollko" and use it for the preparation of margarine can apply for a licence and obtain it under the sub-section. I cannot see that the food will be reduced in price by allowing these importers of "Yollko" to get the whole benefit of this particular manufacture instead of compelling those persons who wish to use this preparation in the production of food to apply for and obtain their own licences.

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For these reasons I think that the learned Comptroller came to an erroneous decision and that this appeal must be allowed with costs. The costs of the hearing before the Comptroller will be left to him, with an intimation from this Court that those costs and the costs of any application to him in respect thereof should be given to the patentee.

Solicitors: *Lawrance, Webster, Messer & Nicholls; George Beloe Ellis; Solicitor, Board of Trade.*

G. R. A.

In re CURWEN AND FRAMES' CONTRACT.

P. O. LAWRENCE J. 1924 *Feb.* 28.

[1924. C. 20.]

Settled Land—Tenant for Life—Settlement containing Power to appoint Life Interest—Sale by Appointee of Life Interest—Trustees for Purposes of Settled Land Acts—Compound Settlement—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1.

By a settlement made in 1892, land was settled to the use of trustees upon certain trusts during the life of Chaloner Curwen, with remainder to his first and other sons successively in tail, with power for him by deed or will to appoint the rents and profits to any wife surviving him for her life; and trustees were appointed of the settlement for the purposes of the Settled Land Acts. By deed poll Chaloner Curwen, on his marriage, exercised that power and appointed that the settled land should upon his death remain to the use of the trustees of the settlement during the life of his wife upon trust to pay the rents and profits thereof to her. The appointor died in 1897, and his widow and his eldest son, the first tenant in tail, joined in disentailing the settled land and conveyed the same to uses for raising certain charges, and subject thereto, to the use of the settlement trustees during the life of the widow in restoration of the estate limited to them by the deed of appointment, with all powers annexed to such estate or vested in them or the widow during the continuance thereof, with remainder to the eldest son in fee simple.

On the sale of part of the settled land by the widow, as tenant for life under the Settled Land Acts, the purchasers raised an objection to the title on the ground that there were no trustees for the purposes of those Acts of the compound settlement consisting of all three deeds, or at any rate of the settlement created by the original settlement and the deed of appointment:—

Held, that the land stood limited in trust for persons by way of succession under or by virtue of a deed—namely, the settlement of September 5, 1892, within the meaning of s. 2, sub-s. 1, of the Settled

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Land Act, 1882; and that, as there existed trustees of that settlement for the purposes of the Settled Land Acts, it was not necessary to have trustees for those purposes of either of the compound settlements aforesaid, and that, consequently, the purchasers' objection to the title failed.

ADJOURNED SUMMONS.

By an indenture of settlement dated September 5, 1892, made in contemplation of the marriage between Chaloner F. H. Curwen and Elizabeth C. C. G. Cameron, certain lands, money and funds were settled to the use of trustees during the life of Chaloner F. H. Curwen upon certain trusts therein mentioned, with remainder to the use of his first and other sons successively according to seniority in tail. The settlement contained a power for Chaloner F. H. Curwen by deed or will to appoint to any wife surviving him for her life, if he should leave issue him surviving, the whole or any part of the rents and profits of the settled property; and the trustees of the settlement were also appointed to be trustees of the settlement for all the purposes of the Settled Land Acts.

By a deed poll dated October 12, 1892 (executed shortly before his said marriage), Chaloner F. H. Curwen, in exercise of the power contained in the settlement, appointed that, in case the said Elizabeth C. C. G. Cameron his then intended wife should survive him, the settled property should immediately after his death in case he should leave issue him surviving, remain and be to the use of the trustees of the settlement during her life upon trust to pay the whole of the rents and profits of the settled property to her during her life.

On October 20, 1892, the marriage between Chaloner F. H. Curwen and the said Elizabeth C. C. G. Cameron was duly solemnized.

Chaloner F. H. Curwen died on March 3, 1897, leaving issue him surviving, of whom his eldest son Chaloner Eldred Curwen, who attained the age of twenty-one years on September 12, 1914, was the first tenant in tail of the settled property, and by a disentailing assurance dated November 2, 1914, and made between Chaloner Eldred Curwen, Elizabeth C. C. G. Curwen, as tenant for life of the settled property, and the settlement

trustees, the settled property was duly disentailed and conveyed to uses for raising certain charges, and, subject thereto, to the use of the settlement trustees during the life of Elizabeth C. C. G. Curwen in restoration of the estate limited to them by the deed of appointment, with all powers annexed to such estate or vested in them or Elizabeth C. C. G. Curwen during the continuance thereof, with remainder to the use of Chaloner Eldred Curwen in fee simple.

By an agreement dated November 8, 1923, Elizabeth C. C. G. Curwen, as tenant for life of the settled property, agreed with Madeline Ethel Frames and Ethel Ivy Williams for the sale to them of the fee simple in possession of part of the settled land situate at Patcham, in the county of Sussex, for the sum of 300*l*. The purchasers by their requisitions raised an objection to the title on the ground that it was not sufficient that there were trustees of the settlement of September 5, 1892, for the purposes of the Settled Land Acts, but that it was necessary to have trustees for the purposes of those Acts of the compound settlement, consisting of the settlement, the deed of appointment, and the disentailing assurance, or at any rate of the settlement and the deed of appointment.

In consequence of the vendor's refusal to have such trustees appointed as the purchasers required, a summons was taken out by the purchasers under the Vendor and Purchaser Act, 1874, asking for a declaration that their requisition had not been sufficiently complied with.

W. A. Peck, for the purchasers. I admit that it may not be necessary, having regard to the decision in *In re Cope and Wadland's Contract* (1), that there should be trustees for the purposes of the Settled Land Acts of the compound settlement consisting of all the three deeds; but it is necessary to have such trustees of the compound settlement consisting of the original settlement and the deed of appointment, because it was under or by virtue of those two instruments that the land

(1) [1919] 2 Ch. 376.

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in question "stood for the time being limited in trust for persons by way of succession" within the meaning of s. 2, sub-s. 1, of the Settled Land Act, 1882.

N. C. Armitage for the vendor.

P. O. LAWRENCE J. This summons raises a short point upon which I have arrived at a clear conclusion. [His Lordship then stated the material parts of the three instruments above referred to and continued:] Chaloner Curwen died on March 3, 1897, leaving issue: thereupon, the life interest which he had appointed in favour of his wife became effective and is now subsisting. The wife, as tenant for life under the Settled Land Acts, contracted to sell certain of the settled estates to the present applicants. The objection raised by them is, that there is a compound settlement of which it is necessary to have trustees appointed for the purposes of the Settled Land Acts, before a good title can be made. In my judgment, no such appointment is necessary. Sect. 2, sub-s. 1, of the Settled Land Act, 1882, defines a settlement as "any deed . . . . or other instrument . . . . under or by virtue of which any land or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession." In the present case, the property in question stands limited in trust for persons by way of succession under or by virtue of the settlement of September 5, 1892. The power to create the life interest was conferred by that settlement, and when that power was exercised by the deed poll of October 12, 1892, the life interest thereby created was, in my opinion, a life interest created under or by virtue of the settlement of September 5, 1892. In my judgment, therefore, it is amply sufficient to have trustees of that settlement for the purposes of the Settled Land Acts; and the contention that it is necessary to have trustees appointed of a compound settlement consisting of the settlement and of the appointment, before the tenant for life can sell the property, is ill founded.

A further point was taken which, in my opinion, has no substance in it. On November 2, 1914, the tenant for life and the tenant in tail joined in a disentailing assurance for the

purpose of raising a sum of 300*l.*, and, subject to the uses which were created for the purpose of raising that sum and for the purpose of effecting certain charges, the ultimate uses were to the settlement trustees during the life of the tenant for life in restoration of the estate limited to them by the deed poll of October 12, 1892, with all powers annexed to such estate or vested in them or in the tenant for life during the continuance thereof, with an ultimate remainder to the use of Chaloner Eldred Curwen in fee simple. It was suggested, though not seriously argued by Mr. Peck, that it was, at all events, necessary to have trustees of the compound settlement consisting of the original settlement and of the disentailing assurance appointed. In my opinion, however, this point is covered by the decision of Sargant J. in *In re Cope and Wadland's Contract* (1), which I intend to follow.

In the result, I hold that the requisitions and objections have been sufficiently answered and that the respondent as tenant for life under or by virtue of the settlement of September 5, 1892, can make a good title without having trustees of the alleged compound settlement appointed.

Solicitors for the applicants: *Saxton & Morgan.*
Solicitors for the respondent: *Lawrence, Graham & Co.*

(1) [1919] 2 Ch. 376.

H. C. H.

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—— *Hilliard* v. *Cox* (1700) 1 Ld. Raym. 562.
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